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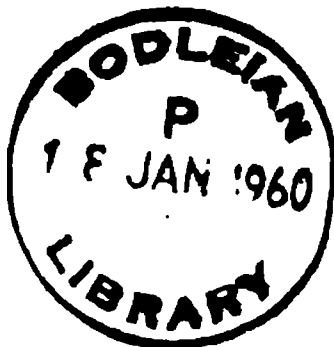
DECISIONS
OF THE 5136
SUPREME COURT
OF
NOVA SCOTIA.

EDITED BY
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JUDGES OF THE SUPREME COURT

DURING THE

PERIOD COVERED BY THE DECISIONS PUBLISHED IN THIS VOLUME.

Chief Justice.

THE HONORABLE SIR WILLIAM YOUNG.

(Appointed August 3rd, 1860.)

Judges in Equity.

THE HONORABLE JAMES W. JOHNSTONE.

(Appointed May 11th, 1864. Resigned June, 1873.)

THE HONORABLE JOHN W. RITCHIE.

(Appointed Assistant Judge September 28th, 1870. Appointed Judge in Equity July 9th, 1873.)

Assistant Judges.

THE HONORABLE EDMUND MURRAY DODD.

(Appointed February 19th, 1848. Resigned October, 1873.)

THE HONORABLE WILLIAM FREDERICK DEARBARRE.

(Appointed November 14th, 1848.)

THE HONORABLE LEWIS MORRIS WILKINS.

(Appointed August 14th, 1856.)

THE HONORABLE JONATHAN McCULLY.

(Appointed September 28th, 1870.)

THE HONORABLE HUGH McDONALD.

(Appointed November 5th, 1873.)

THE HONORABLE HENRY W. SMITH.

(Appointed 15th January, 1875.)

Attorneys General.

THE HONORABLE HENRY W. SMITH.

Appointed April 17th, 1871. Resigned December, 1875.)

THE HONORABLE DANIEL McDONALD.

(Appointed January 2nd, 1873.)

ERRATA.

PAGE.

1. *Morton v. Patillo*, head note, 15th line, for "uncontradictory" read "contradictory."
35. *Smith v. McEachren*. See the judgment of Ritchie, J. to the same effect at p. 279. These judgments are evidently in the same matter though published as independent decisions and as of different dates.
86. *Chisholm et al. v. Chisholm et al.*, second line from foot of page, for "nonsuit" read "rule."
207. *Black v. Halliburton*, head-note, line 5, for "divided" read "dividend."
224. *De Wolf v. Punchard*, head-note, line 5, for "stipulated" read "prescribed."
298. *McDonald v. Blois*. The judgment of Wilkins, J., here published, was not the judgment of the Court, as stated, but was delivered as a dissenting opinion and should have appeared next after the judgment in the same case of Sir W. Young, C. J., which will be found at p. 283.
352. *Hill v. Culman*, head-note, line 3, after "set" insert "aside."
354. *Kerr v. Davison*, head-note, third line from end, for "plaintiff" read "defendant."
424. *Robertson v. Lovett*, head-note, third line from end, after "acted" insert "upon."
502. *Kerr et al. v. McLellan*, head-note, 9th line, for "cause" read "course."
532. *Murdoch v. Belloni*, for "Belloni" read "Lawson,"

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DECISIONS
OF THE
SUPREME COURT OF NOVA SCOTIA,
DECEMBER TERM, 1871.

HORNSBY v. JOHNSTONE.

DEFENDANT drew up and placed in the hands of Allan, a real estate agent, a memorandum in the following form: "I will sell ten acres of land (including the water lots), as also two and three-quarter acres of land belonging to Judge Johnstone adjoining, for the sum of four hundred and thirty dollars per acre, equal to \$5482.50, or £1370 12s. 6d., and on which sum I will allow you a commission of two per cent." The memorandum then specified the terms of sale. Allan entered into a written agreement with plaintiff for the sale of the land on the terms mentioned. The agreement not being carried out, plaintiff brought a suit for specific performance, setting out the two agreements.

Held, (1) That the memorandum handed to Allan was a power to sell on the prescribed terms without restriction as to purchaser, if the terms could be obtained.

(2) That plaintiff's right to a specific performance rested entirely on the defendant's memorandum; that defendant was no party to the agreement entered into by Allan, and that when the latter brought into the agreement anything that went beyond the memorandum he exceeded his authority.

(3) That the agreement could not be imported into the memorandum, and the latter being of a vague and uncertain character, and not sufficiently describing the lands, specific performance could not be enforced.

Sections 61 to 70 of the *Practice Act*, chapter 134 R. S. (3rd Series) apply equally to demurrers in Equity as at Common Law.

YOUNG, C. J., now, (April 23rd, 1872,) delivered judgment as follows:—

This is a suit for specific performance commenced by a writ of summons, as required by the *Equity Act*, chap. 124, sec. 6, containing three counts, to which the defendant, upon leave obtained, has both pleaded and demurred. The suit was brought 21st *July*, 1869, upon an agreement for the sale of lands, dated 16th and 17th *April*, and the demurrer was filed on the 10th *September* in that year. Delays from various

causes having arisen, and the Judge in Equity being interested in the cause, the demurrer was recently argued before me, and the first question that arose was the regularity of the demurrer book filed by the defendant, (one having been filed also by the plaintiff,) which involved something more than mere matter of form. The agreement, as alleged by the plaintiff, was annexed to his writ as an exhibit marked "A," consisting of a memorandum, as follows:

"I will sell ten acres of land (including the water lots) as also two and three-quarter acres of land belonging to Judge *Johnstone*, adjoining, for the sum of four hundred and thirty dollars per acre, equal to \$5452.50 or £1370 12s. 6d., and on which sum I will allow you a commission of 2 per cent. Terms of sale as follows, say:

	£	s.	d.
One-third cash	456	17	6
Two-thirds on mortgage.....	913	15	0
<hr/>			
12½ acres at \$430	1370	12	6

"(Sgd.) J. W. JOHNSTONE

"16th April, 1869."

Then followed a second memorandum, as follows:

"I agree to be the purchaser of the foregoing property, agreeable to the terms therein expressed."

"(Sgd.) B. H. HORNSBY."

"17th April, 1869."

And an agreement without date, as follows:

"Agreement made and entered into between *William M. Allan*, agent of *James W. Johnstone* the younger, of *Dartmouth*, Esquire, and *Bennet H. Hornsby* of *Halifax*, Esquire:

"Whereas the said *James W. Johnstone* the younger, by an instrument in writing under his hand dated the 16th day of *April*, A. D. 1869, authorized the said *Wm. M. Allan* to sell ten acres of land at *Dartmouth*, on the western side of the road leading to the South Eastern Battery, including the water lots, and also two and three-fourths acres of land adjoining, for the sum of four hundred and thirty dollars per acre, one-third to be paid in cash and the remainder to be

secured by bond and mortgage, as will appear by the said instrument or authority, which is hereby annexed.

"And whereas the said *Bennet H. Hornsby*, on the 17th day of *April*, A. D. 1869, agreed to purchase the said lots of land upon the terms and at the price above mentioned.

"Now the said *Wm. M. Allan*, as such agent, doth hereby agree with the said *Bennet H. Hornsby* to sell him the said twelve and three-fourths acres, including the water lots, at the price of four hundred and thirty dollars per acre, or five thousand four hundred and eighty-two dollars and fifty cents for the whole, and to give him good and sufficient deed or deeds, to convey the same to him in fee-simple, free from incumbrances, one-third of the said amount to be paid in cash and the balance secured by bond and mortgage on the premises.

"And the said *Bennet H. Hornsby* agrees to purchase said lots on the terms above mentioned, and to pay therefor four hundred and thirty dollars per acre, one-third to be paid in cash and the balance secured by bond and mortgage on the premises."

"(Sgd.) *WM. M. ALLAN,*
Agent for *J. W. JOHNSTONE.*
B. H. HORNSBY."

"(Sgd.) *J. N. RITCHIE,* }
Witness." } }

The defendant's demurrer book sets out only the first memorandum. The plaintiff's set out this and the other two papers, which I held to be right, and directed the defendant's demurrer book to be amended accordingly.

Another preliminary question then arose as to the extent and scope of the argument. The defendant and his counsel contended that they had a right to take all technical and formal objections according to the Chancery practice in *England*, while the counsel for the plaintiff urged that the *English* practice did not apply, and that the defendant was confined to matters of substance. This question was by no means new to me, and I had formed a very decided opinion upon it. Our Equity Court being a branch of the Supreme Court, is bound by the fourth section of the *Equity Act* to observe the practice of that Court unless in exceptional cases, and, by the eighth section, demurrers in Equity causes are to be heard

and determined on the same principles as obtain in the Supreme Court. I am of opinion, therefore, that sections 61 to 70 of the *Practice Act*, chapter 134, apply equally to demurrers in Equity as at Common Law. In the case of *Wormald v. DeLisle*, 3 Beavan, 18, which was cited at the argument, decided in 1840, the Master of the Rolls allowed a demurrer on the ground of the statements in the bill being vague and uncertain. This, I think, cannot be done here, the defendant having his remedy under chapter 134, section 62. It was stated that the Equity Judge had heard a demurrer on the ground of multifariousness, but this I must take leave to doubt. So also surplusage, impertinence, and other grounds of demurrer in the Chancery books are, in my view, to be met by the remedies in our own practice. And the counts of the plaintiff's writ or declaration being demurred to as bad for reasons assigned, I directed the words "in substance" to be added, the plaintiff in his joinder to the first, second and third amended counts having alleged that they were severally good in substance.

Now there are, no doubt, objections to each of the three counts which do not apply to all, and each of them with a view to costs ought, strictly speaking, to be separately examined. But costs in this argument, as I take it, are a very subsidiary consideration, and the object of both parties is to obtain a judgment on the main questions, which will be much more conveniently and succinctly considered by treating the declaration as a whole.

The defendant, then, by demurring admits, for the purposes of this argument, all the material facts in the writ,—that he signed the memorandum of the 16th April,—that he authorized and empowered the late *William M. Allan* to sell the property therein described at the price mentioned,—that *W. J. Allan* forthwith agreed to sell the property at that price to the plaintiff, and that the plaintiff signed the above papers,—that *Allan*, having signed the agreement, notified the defendant thereof, and that as to the two and three-quarter acres the *Hon. Jas. W. Johnstone*, before action brought, had carried out his portion of the agreement and conveyed the two and three-quarter acres owned by him to the plaintiff; but the defendant has refused to convey his portion, though

one-third of the purchase money has been tendered to him, and the plaintiff has executed and is ready to deliver a mortgage at one year for the other two-thirds.

It will be seen, therefore, that the defences set up in the pleas are to a great extent—and the defence of a revocation of *Allan's* authority known to the plaintiff is altogether—shut out at this stage of the cause, and we have to enquire solely into the grounds of objection to the plaintiff's recovery appearing upon the face of his writ; and these objections, as I have said, must be matters of substance, as set out in the reasons annexed to the three demurrers. There are one or two, partaking more of form than substance, that we may first of all dispose of. It was objected, that if the common law practice prevails, the agreement should have been set out in the body of the writ and not as a matter of annexation or reference. But considering the numerous papers that must sometimes accompany and be more or less fully referred to in Equity suits, I think this is one of the points in which the common law practice is not applicable under section 24, 1 *Daniel's Chancery Practice*, 3rd ed., 309. It was next objected that the defendant's memorandum gave no authority to *Mr. Allan*, because it is not addressed to him. But independently of the second count being founded on a parol authority, this objection is not stated in the reasons for demurring, unless by implication, and if it was to be urged, I think it should have been clearly expressed. It was urged that no parol authority to *Allan* would avail, but this is a point too clearly settled to be disputed, Under the 4th and 17th sections of the *Statute of Frauds*, answering to the 3rd and 4th sections of ours, chapter 118, "some memorandum or note in writing must be signed by the party to be charged or some other person authorized by him," and that authority, as appears by numerous cases in our own and in the *English Courts*, need not be in writing. Whether it would not be wise to require it to be so, at least upon any contract or sale of lands, is a point that has been sometimes debated.

These objections being disposed of, bring us to the main question,—the legal effect of the defendant's memorandum of 16th *April*, under the *Statute of Frauds*, and the admissibility of parol evidence to supply its omissions.

Let us first inquire, what is the fair meaning of this memorandum, and what was in the mind of the defendant when he wrote it. Was it an authority to sell or only to negotiate a sale, as he and his counsel now contend, subject to his approval? Did it empower the agent to find out and close with any purchaser he might select? or was the defendant to have a veto on the selection? These are important distinctions on which several of the cases turn. *Sugden on Vendors*, 14th ed., 132. In *Warner v. Willington*, 3 Drewry, 523, Vice-Chancellor *Kindersley*, in the case of a memorandum of lease observed, that "there was a clear distinction between a memorandum of offer and a memorandum of agreement. In case of an offer no doubt the party signing it may at any time before acceptance, retract; but if it be an agreement, though signed by one party alone, he cannot retract at his pleasure, but all he can do is to call upon the other party to sign or rescind the agreement." This observation does not directly bear upon the case in hand, because the defendant's memorandum was only the appointment of an agent, and the question is the extent of his power before revocation. Now looking at the words: "I will sell," and "I will allow you commission of two per cent," giving the terms of sale, I cannot help thinking that it was a power to sell on these terms and without restriction as to the purchaser if the prescribed terms could be obtained. Had it been a mere authority to look out for an offer, reserving a right to assent to or reject it, the memorandum would have been differently worded. Everything depends on the language used.

In the case of *Chinnock v. Marchioness of Ely*, 6 New Rep., 1, (1865), the Lord Chancellor held that the letters produced did not constitute a contract. "An agreement," he said, "was the result of the mutual consent of two parties to certain terms, and if it was clear there was no *consensus*, what might have been written or said was immaterial." "The house agent here had no authority to make any final agreement for sale of the property; his functions were to exhibit the terms on which the defendant proposed to sell, to receive any offers or proposals, and to transmit them to the solicitor and agent of the defendant."

This is a very different case from the present, where a much more extended authority was given and the memorandum has a defined and obvious meaning.

The passages cited from 1 *Hilliard on Vendors and Purchasers*, 65-68, rather aid this conclusion. In *Coleman v. Lannigan*, 18 Barb., 60, the land broker had authority merely to close the bargain, which, as the Court thought, did not involve the right, in case of lands, to sign a contract of sale. But in *Johnson v. McGruder*, 15 Mis., 365, it was held that although a title bond executed by an agent is insufficient to bind the principal at law, yet if the agent were authorized and intended to bind him, a specific performance may be decreed in Equity, there being a sufficient note or memorandum (that is by virtue of the bond) within the *Statute of Frauds*.

The exceptions, however, that are taken to this memorandum under the statute are much more weighty, and raise some very nice questions. I don't think much of the objection that there is no time specified for payment of the mortgage. It could not have been intended for a less period than a year, and the mortgage having been made payable at that time, a Court is bound, I think, to accept this as a reasonable construction. Neither do I think much of the two and three-fourths acres which the defendant did not own having been included in the memorandum and since conveyed to the plaintiff. The specific performance is sought only as to the ten acres of which the defendant is seised, and which are in no way connected with the two and three-fourths acres or with any interest of the defendant that appears on this demurrer beyond the fact that the two properties adjoin.

In *Price v. Griffith*, 8 Law & Eq. Rep., 76, *Knight Bruce*, L. J., said: "I can conceive a case where a person who has contracted to convey more than it is in his power to convey, ought to be decreed to convey what he can, either with or without making compensation to the vendee for such part of the subject matter of the contract as the vendor is unable to convey." In *Graham v. Oliver*, 3 Beavan, 128, defendant had agreed to sell more than it was found that he owned, (a stronger case than the present where a distinct title to the two and three-fourths acres is stated on the face of the

agreement), and on a bill for specific performance the Master of the Rolls, while stating the difficulty in such cases, says: "The general rule subject to some qualification, undoubtedly is, that when a party has entered into a contract for more than he has, the purchaser, if he thinks fit to accept that which it is in the power of the vendor to give, is entitled to a performance to that extent." It would seem from this case that the plaintiff might have dropped the two and three-quarter acres if not conveyed to him, and proceeded for the ten.

Three objections remain that are worthy of a closer and more extended consideration. It is urged that the plaintiff's name not appearing in the memorandum there is no mutuality (6 C. B. N. S., 249) and no contract as between him and the defendant, and the subsequent agreement between the plaintiff and *Allan* being in the name of the agent and not of the defendant, does not bind him. That the ten acres are not described in the memorandum, and that the parol evidence, which is indispensable to localize and identify the lot is inadmissible in view of the decided cases. All the authorities that were cited at the argument upon these points I have attentively considered, with many others to be found in the books.

The conclusions the Courts have come to have been determined more than once by a bare majority, and the most eminent judges have reversed each others decisions, and sometimes their own. I need instance only the case of *Ridgway v. Wharton*, 6 House of Lords Cases, 252. There the decree pronounced by Vice-Chancellor *Stuart* was reversed by Lord Chancellor *Cranworth*, and, upon further appeal to the House of Lords, the reversal was upheld by Lords *Cranworth*, *Brougham* and *Wensleydale*, but opposed by Lord *St. Leonards*. Their judgments occupy upwards of fifty printed pages of the reports, and the Lord Chancellor's is remarkable for the frank admission of an error he had fallen into in his first decision, for which he is highly complimented by Lord *Brougham*. Folio 256-269. See also *Fitzmaurice v. Bailey*, in the House of Lords, 3 L. T. Rep., 69. In that case the defendant, *Sir John Bailey*, by his agent, signed an agreement in writing to take the lease of a

house from the plaintiff for the residue of the term, being five years, and, further, to take from the plaintiff a lease of stables for the same rent and on the same conditions as the plaintiff held the same. The plaintiff held a lease of the stables of which seven years were to run. It was objected that the term for which the stables were to be taken was not specified in the writing. The Court of Queen's Bench held the memorandum sufficient to satisfy the statute, but their judgment was reversed by the Exchequer Chamber and ultimately by the House of Lords by a majority of one. The Judges who were called in being divided, and the Lord Chancellor being in favor of the plaintiff, but Lords *Cranworth* and *Chelmsford* for the defendant.

One cannot but proceed with diffidence in dealing with matters that have thus divided the leading minds of the profession in *England*. Some principles, however, may be considered as settled, and for my part I have found no *resume* of them so full and upon the whole so accurate as in *Taylor on Evidence*, 3rd ed., fol. 832-5.

If the defendant's memorandum constituted the agreement, —if *Allan* had no authority to enter into the agreement of 17th April, then it is clear that the want of plaintiff's name is fatal to it. *Addison on Contracts*, 60, 566; *Williams v. Lake*, 2 El. & El., 349. The names of both contracting parties must be collected from the memorandum; though on this point the Courts show little inclination in their latter decisions to enforce any strict rule. *Taylor on Evidence*, 835. In *Warner v. Willington*, 3 Drewry's Reps., 523, decided in 1856, which was a suit for specific performance, with a demurrer as in the case in hand, there was a memorandum of lease signed by the lessee but not mentioning the lessor, and Vice-Chancellor *Kindersley* said: "No doubt, as a general rule, in order to maintain an action upon a memorandum of agreement signed by a purchaser or intended lessee, the name of the vendor or intended lessor must appear in the memorandum as well as the other terms of the agreement. *Champion v. Plummer*, 1 N. R., 252. But though this is the general rule, there is this exception, that if it can be ascertained who is the vendor or intended lessor from some other document which is suffi-

ciently connected with the memorandum by clear reference, that will aid the defect of the memorandum."

This other document, it is to be observed, means a document or writing to which reference is made in the defective memorandum, and not a distinct agreement made as in this case in the exercise of a real or supposed authority. See *Dart's Ven. & Pur*, 112; *Wheeler v. Collier*, Moo. & M., 123. Was this agreement then made between the plaintiff and *Allan* as agent of the defendant, and signed by *Allan* as such agent, a legal and sufficient instrument? I will shortly review the authorities on this head. *Dart* in his treatise on *Vendors and Purchasers*, 2nd ed., 120, says: "A signature in the name of an agent will bind the principal if the agency be established," and he cites two cases from 4 *Taunt.*, 209; 2 *B. & C.*, 945; both of which I have examined.

In the case so often cited in the books of *Clinan v. Cooke*, 1 Sch. & Lef., 22, where Lord *Redesdale*, affirmed the sufficiency of a parol authority, the agreement was signed not by the defendant himself though drawn in his name, but by his agent, *Meagher*, under seal, and the question was as to the extent of his authority; but no objection seems to have been taken to the signature by the agent. In *Blore v. Sutton*, 3 Mer., 237, the agreement was signed by the clerk of the agent under his direction, and in the usual course of business, and was held insufficient, though, as it would seem from the language of the Master of the Rolls, it would have been good if signed by the authorized agent himself. The same conclusion I think is to be drawn from the case already cited from 6 *House of Lords*, 258. So that the signature of *Allan* as agent under these cases was sufficient to bind the defendant if he had authority.

The same principles of construction apply to the 4th and 17th sections of the act, and in the case of *Newell v. Rudford*, L. R., 3 C. P., 52, it was held on a purchase of flour that the signature of the defendant's agent bound him. See also the case of *Hood v. Barrington*, L. R., 6 Equity Cases, 222, where the solicitors of the defendant signed an agreement for sale of a lease-hold house, "for and on account of Viscount *Barrington*," and the Master of the Rolls held that the principal was bound.

The main difficulty, however, as I account it, in applying the statute to this agreement still remains. It arises out of the defective description of the premises, and will require a more comprehensive and exact review of the authorities than has been necessary in dealing with the other objections.

I must, first of all, observe that the plaintiff's right to a specific performance rests entirely upon the defendant's memorandum of 16th April. It refers to no other document or paper of any kind, and no other is alleged to have existed under his hand. If, indeed, the agreement of *Allan* could be imported into or connected with it, all uncertainty would be at an end. But that, I take it, is entirely out of the question. The defendant is no party to that agreement, and when the agent brought anything into it that went beyond the memorandum he exceeded his authority.

As a fundamental principle the statute requires written evidence, which need not be comprised in a single document or be drawn in a particular form, but the contract in all essential particulars must be clearly and plainly made out by the letters, memoranda and other writings of the party to be charged. This is clearly laid down by Chancellor *Kent* in *Parkhurst v. VanCourtlandt*, 1 Johns. Ch. Reps., 280: "Unless," says he, "the essential terms of the bargain and sale can be ascertained from the writing itself, or by a reference contained in it, to something else, the writing is not a compliance with the statute. The cases to this point," he adds, "are decisive." He then cites *Blagden v. Bradbear*, 12 Ves., 466, where the receipt was held to be defective in a material particular because it did not specify the price, a point which, if parol evidence had been receivable, could have been easily shown by the auctioneer, but the defendant by insisting on the statute, had thrown it on the plaintiff to establish a complete written agreement, and the bill was dismissed. So in *Clerk v. Wright*, 1 Atk., 12, the omission to mention the price in a letter acknowledging the contract to sell, was held by Lord *Hardwicke* to be fatal, and the statute prevailed.

The same doctrine is to be found in many other cases cited by the Chancellor, as well at law as in equity, and he winds up by saying: "I am warranted in considering it as a settled principle, that, if the Court cannot ascertain with

reasonable certainty the terms (including, he might have added, the subject matter) of the agreement from the writing or some other paper to which it refers, the writing does not take the case out of the statute."

It is to be noticed that in many of the cases the defect in the writing arose merely from accident or carelessness,—it was an omission generally of some particular, on which, as between man and man, there was no room for doubt. Yet the inexorable demand of the statute for a written contract was sustained by the Courts, and a decree for specific performance refused upon this ground.

In the light of these principles let us look again at the memorandum, "I will sell ten acres of land including the water lots, as also two and three quarter acres belonging to Judge *Johnstone* adjoining." This is all. Where are these ten and these two and three-quarter acres of land. At *Dartmouth* or at *Halifax*? In this County or this Province?

The agreement of 17th *April* supplies the omission, and the writ describes them still more particularly than the agreement. But the memorandum signed by the defendant is silent, accidentally it may be,—we presume indeed it was so,—but still it is silent, and as of itself it is obviously insufficient, the question resolves itself into this, whether the memorandum or agreement of the defendant in writing, relied on in the first and third counts, can be supplemented by parol evidence. The second count, for the reason already given, I do not consider apart from the first and third.

Although the objection that the premises were insufficiently set out was taken at the argument and is one of the reasons assigned for the demurrer it did not assume the prominence that it deserves, nor were the cases cited upon this point that have mainly determined my own judgment. Several of the cases on the reception of parol evidence were cited from the most recent books, but not the cases upon the imperfect description of lands.

Let us first of all consider the general doctrine. In *Clowes v. Higginson*. 1 Ves. & Beames, 526, *Sir Thos. Plummer*, V. C., uses this language: "The exclusion of parol evidence, offered to explain, add to, or in some way to vary a written contract relative to land, stands upon two distinct grounds; not simply

as being in direct opposition to the *Statute of Frauds*, but also upon the general rule of evidence, independent of that statute. The writing must speak for itself, and can receive no aid from extrinsic evidence of this more loose and unsatisfactory nature. That which is the rule of law prevails also in courts of equity, which admit of no different rule of law upon this subject. Thus far the rule is perfectly clear; rejecting parol evidence offered by the plaintiff to constitute, vary or explain a contract in writing respecting land, of which he seeks the specific performance in a court of equity." So in the case of *Parkhurst v. VanCourtlandt* already cited, it is declared to be a principle well settled that when the agreement is defective it cannot be supplied by parol proof, for that would be at once to open the door to perjury, and to introduce all the mischiefs which the *Statute of Frauds* and *Perjury* was intended to prevent. The cases of *Clinan v. Cook*, 1 Sch. & Lef., 22, of *Boydell v. Drummond*, 11 East., 142, and of *Brodie v. St. Paul*, 1 Ves., Jr., 326, are very decisive on this point, as far as authority might be wanting in support of a principle so very clear and expedient, and which appears, says the Chancellor, to have been uniformly admitted by the Courts. In the *American* notes to 1 *White & Tudor's Equity Cases*, 543, the same doctrine is maintained and in *Dwight v. Pomeroy*, 17 Mass., 303, *Parsons*, C. J., regarded the principle as fully settled by the more recent Chancery decisions in *England*, and that a few cases (noticed by *Sugden* in his *Vendors and Purchasers*, 164,) bearing a different aspect have been explained away or over-ruled by subsequent decisions (26 *L. T. R.*, 90).

The policy of the statute, says *Taylor*, (folio 835) is to prevent fraud and perjury by taking all the enumerated transactions out of the reach of any verbal testimony. Still, though parol evidence cannot be received to alter the terms of the written contract, or to supply any omissions, such evidence may be admitted to show the situation of the parties at the time the contract was made, or to identify any plans or other documents referred to in the contract, as also to explain the language employed, or even, as it seems, to fix the date at which it was committed to writing.

I have already said that the same rules of construction apply to the 4th and 17th sections of the *English* statute. I refer, therefore, to some of the cases in the 17th, that is on our fourth section, as to the sale of goods. In *Newell v. Radford*, supra, the defendant refused to deliver flour on a memorandum signed by his agent in these words entered in one of the plaintiff's books: "Mr. Newell, 32 sacks colasses at 39/, 280 lbs., to wait orders, John Williams." This was held binding on the defendant, though it was impossible to tell from the memorandum which of the parties was the buyer and which the seller. *Byles, J.*—Here there is more than the memorandum, for there is evidence that the plaintiff was a baker who would require flour, and the defendant a person who was in the habit of selling it. *Bovill, C. J.*—The surrounding circumstances are always admissible to explain any ambiguity (I presume the Chief Justice meant any latent ambiguity) in the written contract. In *Spicer v. Cooper*, 1 Q. B., 424, (which turned upon the meaning of words as used in the trade) parol evidence was admitted to show that £5 mentioned in the memorandum meant £5 per cwt. And in *McDonald v. Longbottom*, 1 Ell. & Ell., 977, it was admitted to show that "your wool" included wool bought of other farmers besides that which came from the plaintiff's own sheep. Now as to the 4th section of the *English* statute. The latest case I have found is that of *Horsey v. Graham*, L. R., 5 C. P., 9, decided in 1869, which was an action of damages. The plaintiff being desirous of obtaining a transfer of the lease of a public house from defendant, who was a public house broker, two memoranda passed between them, in the second of which defendant said: "Mr. H. (the plaintiff) now informs me he is in possession of £60 cash, and such being the case, I hereby agree to get the lease and everything for such sum of £60 cash." The defendant acted as broker and had no interest in the public house himself. One of the questions was, whether the agreement was sufficiently definite to constitute a good memorandum in writing, and it was held that it was,—that the meaning of the word "everything" might be explained by the first memorandum in writing, and that parol evidence was admissible to show what the lease was to which the second

memorandum referred. *Bovill*, C. J.—“It is always allowable to show what is the matter respecting which the contract is made, and a contract for the sale of Blackacre is indefinite till it is shown what Blackacre is. Then it is said that the word “everything” is too indefinite; but it will be rendered definite so soon as it is known what the parties are contracting about; and here that is to be found in writing in the first memorandum of the 10th of March.” So in the case of *Sarl v. Bourdillan*, 1 C. B., N. S., 182, *Cresswell*, J., said: “The question of identity (meaning identity of parcels) in an agreement under the 4th section of the act may be left to parol evidence.”

It will now be perceived on how narrow a point this case in my opinion turns. The decisions upon it are few. I have cited two of the most recent. Let us now look to the earlier ones. In *Ogilvie v. Foljambe*, 3 Mer., 53, in 1817, the defendant's letter spoke of the house as “*Mr. Ogilvie's house*,” and the Master of the Rolls said that parol evidence has always been admitted in such a case to show what house and to what premises the treaty related. In *Owen v. Thomas*, 3 Myl. & Keene, 353, in 1834, the house was mentioned as “the house, etc., in *Newport*. The money to be paid soon as the deeds can be had from *Mr. Deere*.” On which the Master of the Rolls observed: “It is true that the agreement must be certain in its terms but *id certum est quod certum reddi potest*. It appears upon the face of the agreement that the house referred to is the house of which the deeds were in the possession of *Mr. Deere*, and the house might easily be ascertained before the Master.” On this case *Sugden's Vendors and Purchasers*, 14th ed., 135, remarks that if the property be not identified, but is capable of being so by the reference in the agreement or letter, that is sufficient. In *Bleakly v. Smith*, 11 Sim., 150, in 1840, *Bridges*, the defendant's testator, drew up the following memorandum in his own handwriting: “*July 26, 1839. John Bleakly agrees with J. R. Bridges to take the property in Cable Street for the net sum of £248 10 0.*” The bill was filed against *Bridges'* executor and his infant heir for a specific performance of the agreement, and the main question was whether it was binding on them, *Bridges* not having written his name either at the

foot of the agreement or in any other part of it; but being all in his own hand, the Court held that it was; and as to the premises, it is said, and therefore must have been shown by extrinsic evidence, that *Bridges* had no property in Cable Street, except an undivided moiety of five freehold houses of which he was seized, and a conveyance of the moiety to the plaintiff was decreed.

On the authority of this case, had the memorandum in the case under consideration contained the words "at or near *Dartmouth*," and it had been alleged in the writ or proved in the hearing that the defendant was seized of ten acres in *Dartmouth*, and of no other property of the same extent adjoining the *Hon. Judge Johnstone's*, I am of opinion that the plaintiff would have been entitled to a specific performance. But on the best consideration I can give to this case,—and I have bestowed upon it more than ordinary pains—I do not think that so vague a description, unassisted by any other document or reference, is enough to satisfy the statute and to entitle the plaintiff to a deed. In 2 *White & Tudor's Equity Cases*, American edition, 558, it is said: "If a contract be vague and uncertain, a Court of Equity will not exercise its extraordinary jurisdiction, but will leave the party to his legal remedy. In *Reid's Heirs v. Hornbuck*, 4 J. J. Marsh, 377, it was ruled that specific performance of a contract will not be enforced unless parties have described and identified the particular tract, or unless the contract furnishes the means of identifying with certainty the land to be conveyed. Other *American* cases on the doctrine will be found in 2 *Sumner*, 278; 14 *Peters*, 77; 13 *Johns*, 297.

I am of opinion, therefore, that the bill should be dismissed, but it is plainly not a case for costs, and on that point I shall follow the example of the Master of the Rolls in 12 *Ves.*, 473, and of the Equity Judge in *Hunter v. Handley*, and leave each party to bear his own.

DECISIONS
OF THE
SUPREME COURT OF NOVA SCOTIA,
JULY TERM, 1872.

MORTON v. PATILLO.

THE Association of which defendant was a member issued a policy insuring plaintiff's vessel against total loss for the period of one year. The vessel, while on a voyage from St. Domingo to Boston, encountered a violent storm, in consequence of which she was obliged to run for Bermuda, where she arrived in a badly damaged and leaky condition. A survey was held on February 20th and again on March 10th, to ascertain the extent of damage, but in the interim, on the 6th March, the master wrote the plaintiff informing him that the expense of repairing at Bermuda would be more than the vessel had cost or was worth, and stating that he would abandon her to the underwriters and sell her for the benefit of all concerned. The sale was held on the 13th March and the result communicated to the plaintiff by letter dated the 15th. The plaintiff testified that the contents of the first letter were communicated to the underwriters, and a verbal notice of abandonment given, and a claim for a total loss made, but the evidence on these points was uncontradictory. The jury found a verdict for plaintiff and a rule was taken to set it aside.

Held, per SIR W. JOURNE, C. J., That the oral abandonment by plaintiff, coupled with the exhibition of the master's letter of the 6th March, and his claim for a total loss was enough to satisfy the law. Also, that the notice was in time, even though the sale on the 13th March reduced it to a matter of form and gave the underwrites no option and no opportunity to repair.

Per JOURNE, F. J., The time at which the notice of abandonment was given was essential to plaintiff's right to recover, and it appearing that the sale was made before the abandonment, or, at least, that it was doubtful, there must be a new trial.

If the sale were made before notice of abandonment to the underwriters, the sale would be the act of the agent of the owners, and inasmuch as it would deprive the underwriters of the option of repairing the vessel or otherwise dealing with her, the abandonment would be ineffectual.

The cost of repairing the vessel taken in connection with her value when repaired, would have justified abandonment, but the vessel being in a place of safety, and there being regular opportunities for communicating with the owners and underwriters, the sale in the absence of such communication was illegal.

Per WILKINS, J., The case being one of constructive total loss, and no circumstance being proved to take it out of the established rule of law, due notice of abandonment to the underwriters was an essential condition to the plaintiff's right to recover. Notice being essential the onus of establishing it was on the plaintiff. The notice contained in the master's letter of March 6th, supposing it to have been communicated to the underwriters, was ineffectual as it gave them no opportunity of electing to repair the vessel. Urgent necessity alone, the existence of which was negatived, could have made the sale lawful.

SIR W. YOUNG, C. J., now, (July 1st, 1872,) delivered judgment as follows:—

This is an action on two policies of insurance on the brigantine *Ida C.*, one on the vessel for a year against total loss, dated 25th *November*, 1868; the other on freight by that vessel, dated 3rd *February*, 1869. The plaintiff was registered owner; the master in point of fact owning one-eighth, and plaintiff's son *Samuel R.* two-eighths. The defendant is president of the association at *Liverpool* by whom the two policies were granted, and the plaintiff is one of the directors. The cause was tried before my brother *Wilkins*, at *Liverpool*, in *June*, 1871, and the jury having answered four questions submitted to them by the learned Judge, found a verdict for the plaintiff on the ship for the full amount, less defendant's proportion of an average statement which was in proof. On the freight policy they found for the defendant, and cross rules were granted, which were argued before us at the last term.

The evidence at the trial consisted of a commission executed at Bermuda where the ship was sold, of the captain's deposition taken *de bene esse*, and of the oral examinations of plaintiff and defendant, and of several other witnesses. I shall not go into it in detail but content myself with a reference to the leading facts. The ship being in good condition, covered by two policies, one of the defendants, the other from a *Halifax* office, and each of \$3000, sailed from *St. Domingo*, 6th *February*, 1869, bound for *Boston* with a cargo of log-wood, *lignumvitæ*, honey and sugar. On the 13th she encountered a violent storm, shifted her deckload, lost many of her spars, and sprung a leak which forced her to run for Bermuda, where she arrived in a crippled condition about the 24th or 26th. On the 26th a survey was held by competent parties who, on a careful examination of the vessel, recommended the cargo's being discharged for the purpose of making further examination, and prosecuting repairs. On the 6th *March* the master addressed a letter to the plaintiff, stating, strangely enough, and twice repeating it, that he had arrived on the 18th, that a survey had been held, that on further examination it was thought best to unship the cargo and get it to its port of destination as soon as possible, that

he had chartered the brig *Sarah Ann*, of *Bermuda*, to take the cargo forward, that the expenses of repairing the *Ida C.* there would be about \$6000, which is more than she cost or is worth. He adds: "I shall abandon her to the underwriters and sell her for the benefit of all concerned." "Next mail I will send protest and all papers appertaining to the brigantine *Ida C.*" "This is the only course I can follow. To think of fitting her out here is out of the question, not only for the great expense but the time lost. To fit her out I should be here three months." On the 10th *March* the surveyors again visited the vessel, the cargo being nearly cut. They found the butts and seams very slack and open from the straining of the vessel, and recommended the bottom being stripped, caulked and sheathed. The surveyors made but one report without date. It was of course after the 10th *March*, and as will be seen, does not authorize or recommend the sale which the master had previously decided on and had already advertised. On the same day the three surveyors sign an estimate of the probable expense of repairing and refitting the brigantine, giving the particulars, and amounting in all to £1264 stg. The sale was held on the 13th *March* and produced about £250, and the evidence under the commission shows that it was well attended and was a fair and *bona fide* sale. The witnesses under the commission, who are shown to be respectable men, concur in thinking that the master exercised a sound discretion in refusing to repair and in selling the ship, and three of them sign a certificate to that effect, and that the estimate of the expenses was not exaggerated. The purchaser of the vessel was examined as a witness, and stated that he repaired her temporarily at a cost of £749 stg., and having sold her for a sum less than the estimate she was sent to sea. On the 13th *March* the master addressed a second letter to the plaintiff with his protest, stating the fact and the results of the sale, that he had paid off most of his crew, and would sail next day in the *Sarah Ann* for *Boston*. He adds: "It is a bad business, but could not be helped." These two letters were admitted by the Judge as illustrative of plaintiff's statements to the directors. The first of them was sent by one of Her Majesty's ships, the second by mail. It does not appear when they were received. The master, in his evidence,

says if the vessel had been his own he would have sold her as he did. He sold her with the approval of his agent and all concerned, because she was not worth the amount it would have cost to repair her. He did not know that the vessel and freight were insured for more than \$3000, though he had recommended a further insurance, and appears to have acted *bona fide* and with due diligence. On receiving the letter of 6th *March* plaintiff verbally communicated to the companies what Capt. *Hines* had written. He communicated it to the broker and the directors. He received the second letter and protest. The directors never asked him for any proof. He informed them verbally he had abandoned. The directors said they did not consider it a total loss. On his cross-examination he said: "I think the first day the directors met after I heard from *Hines* I communicated. They met Tuesdays and Fridays. I think the interval was about two days. I am certain I read contents of letter. Notice was given to the directors in their room of business. I am not sure I used the word 'abandoned.' I told the directors I had proceeds of sale, and that the vessel had been sold for all concerned." On the part of the defendants the broker said: "The plaintiff did not abandon in any way to me. He never read either of the letters to me or made me know the contents. All he said was that the vessel was lost. When a verbal notice of abandonment is given I enter it in the company's book. The book contains no entry of any notice of abandonment in this case. I wrote a letter for the directors to *Yeoman*, on the 16th *April* for his opinion whether the loss was a total loss or not. Of course plaintiff before this had claimed for a total loss. I don't recollect all that plaintiff told me. He may have told me the contents of the letter, or that the vessel was abandoned. I have no doubt the plaintiff communicated the fact of the loss as soon as he received it.

The defendant, Tupper and Rees, three of the directors, all testify that no notice of the abandonment was ever given to their knowledge. They knew the plaintiff claimed for a total loss, but none of them admit having seen the captain's letter of 6th *March*. They knew of the sale by the second letter, and the defendant thinks the papers brought by *Hines* were the first received. All of this evidence was submitted to the

jury with the four questions I have referred to. The Judge was of opinion that both as respected the vessel and the freight the verdict should be for the defendant, but in respect of the vessel the jury, as I have said, found for the plaintiff, and we have now to inquire whether both or either of these findings can be sustained. The policy on the vessel is for one year against total loss. The fact was brought to our notice at the argument, but not a word was said by either party as to the effect and meaning of such a policy, which is the more remarkable as it has lead to great diversity of opinion in the courts of the *United States*. When applied to a vessel and not to cargo it must be taken to include all average charges, a point that does not arise here, and on which little is to be found in the books. The more material question is, does it extend to a constructive or technical as well as to an absolute total loss? *Mr. Parsons* in the second volume of his work on *Insurance*, 111, considers this a very difficult question, and he reviews the various phrases that have been used in policies, and the numerous and conflicting cases in which I might have felt it my duty to have followed him had the question been raised, but from the course of the argument we must infer the acquiescence of the defendant's counsel in what appears to be the conclusion of the Supreme Court of *Massachusetts*, and hold that a constructive loss if established comes within the definition of a total loss under this policy. *Mr. Parsons*, however, notes that the words "total loss," when applied to cargo or freight, mean actual and not constructive total loss.

There is no pretence here of an absolute total loss of the vessel. She remained *in specie* in a safe harbour, capable of repair as the event showed, of a repair costing as alleged more than she was worth when repaired, and justifying her sale as the most prudent step which the owner if nonsuited could have taken. But still it must be conceded that the case differs widely from that of a ship stranded on a rock and liable at any moment to be dashed to pieces or reduced to a mere wreck,—a mere congeries of planks, without the form or substance of a ship. Had the sale been questioned by the registered or other owners it would have been very difficult for the master to have vindicated such a sale, or for the purchaser

to have maintained his title. The master puts it solely upon the ground of the heavy expense and the delay incident to repairs, and he professes his purpose to abandon to the underwriters upon that ground alone. Two questions therefore arise; *First*, did the facts warrant such an abandonment and sale? and, *secondly*, was an abandonment in point of fact made, or, if made, was it in time? On the first point the plaintiff's counsel relied upon the cases of *Irving v. Manning*, 1 H. L. C., 287, and 6 C. B., 391; *Fleming v. Smith*, 1 H. L. C., 513, and *Moss v. Smith*, 9 C. B., 94, decided in 1850. In the first of these cases the rule which, as Lord Campbell said, had agitated Westminster Hall for the last thirty years, was at last solemnly decided by the House of Lords after consulting the Judges. In delivering their judgment *Patterson, J.*, said (6 C. B., 419): "It is found that the vessel during the voyage was so damaged as to be incompetent to proceed without repairs, that the necessary expenditure in order to repair her and make her sea-worthy would have amounted to £10,500, and that the ship would have been then worth £9000 only, which was her marketable value then and at the time of the policy; that a prudent owner nonsuited would not have repaired the vessel, and that she was duly abandoned to the underwriters. It is clear," he says, "that on the facts so found there was a total loss, for a vessel is totally lost within the meaning of a policy when it becomes of no use or value as a ship to the owner, and is as much so as if the ship had gone to the bottom of the sea, or had been broken to pieces, and the whole or greater portion of the fragments had reached the shore as wreck, and the course has been in all modern times to consider the loss as total where a prudent owner would not have repaired." In *Moss v. Smith*, there were two policies, as in the case in hand, one upon the ship and the other upon freight. The declaration alleged an abandonment to the underwriters which they did not accept, and upon the question of total loss the jury found in their favor. At the trial before *Wilde, C. J.*, His Lordship told the jury that if, upon the evidence laid before them, they were satisfied that the vessel was damaged by perils of the sea to such an extent that she was not susceptible of repair save at an expense which would exceed her value when repaired, regard being

had to the facilities for repairs and for raising money for that purpose at *Valparaiso*, and the time which would be consumed thereby, they must find for the plaintiffs as for a total loss of the ship. These instructions are almost identical with the first question put in this case to the jury, and they having found for the plaintiff, upon sufficient evidence, their verdict upon this head cannot be disturbed.

The difficulty as to the vessel arises out of their second answer which we have now to consider. It is clear, I think, indeed it was scarcely questioned at the argument, that to convert this constructive loss into a total loss there must be an abandonment and due notice of it given to the underwriters. In *Roux v. Salvador*, 3 Bing., N. C., 266, Lord Abinger delivered the judgment which has so often been cited in subsequent cases. "If the insured," said he, "elect to treat the damage to his ship as a total loss, and the ship or thing insured, or a portion of it, still exists, and is vested in him, the very principle of insurance requires that he should make a cession of all his rights to the recovery of it, that the underwriters may be entitled to the full benefit of what may be of any value." And in the recent case of *Potter v. Rankin*, 92 L. T. R., N. S., 349, *Cleasly, B.*, said: "Usage has made notice of abandonment the right of the underwriters. Convenience also is in favor of it; for if the notice is given the underwriter knows his position, whereas he may not know for years whether he is to be held responsible or not. He cannot know the exact extent of damage, or the probability of the owner repairing in each particular case, and the rule seems to be a reasonable and convenient one that the owner should inform him of his determination in the usual way, viz., by a notice of abandonment." This was an insurance on freight, where the Exchequer Chamber, reversing the judgment of the Common Pleas, held that the notice of abandonment having been given as soon as the state of the vessel was ascertained, it was sufficient to render the loss of both ship and freight constructively total, and Lord Cockburn, who concurred in the final judgment, took the distinction between the abandonment of a shadowy and unsubstantial interest and an appreciable right. "To necessitate a notice of abandonment," he says, "there must be an actual tangible and appreciable right

or interest capable of being transferred." Now on the 6th of *March*, in this case, there was the ship remaining in specie,—an actual and tangible interest which it was incumbent on the plaintiffs claiming for a total loss to abandon to the underwriters and to give notice thereof. The jury have found that he gave notice verbally to the directors and broker on the receipt of the letter of 6th *March*. The point is, was this enough and was it in time? We must see also if the finding is sustained by the evidence. I have little doubt that the jury were influenced in this finding by the fact that the defendant is an underwriter and that the loss appears to have been *bona fide*. Still there is some evidence to support it. The plaintiff it must be recollected was dealing with his co-directors, and the same exact compliance with forms is not to be expected as in the case of a third party, a stranger to the "board." It is clear that he claimed as for a total loss from the first, and there was no conceivable motive for his concealing or withholding the letter of 6th *March*. He says: "I am certain I read contents of letter, and the letter contains these words, 'I shall abandon the vessel to the underwriters.'" He says also: "I informed the directors verbally that I had abandoned. Notice was given to the directors in their place of business." And although he says in his cross-examination that he is not sure that he used the word "abandoned," and it is clear that neither the directors nor the broker considered notice to have been given, I think that the findings of the jury on the third and fourth questions must be accepted as facts, and we must inquire whether as such they entitle the plaintiff to recover. The cases upon the form and manner of abandonment are collected in the note to *Roux v. Salvador*, Tudor's Mer. Law, 168, and in 2 *Parsons on Insurance*, 172. No especial form or writing is required, but the word "abandoned," according to Lord *Ellenborough*, should be used, (1 *Camp.*, 541,) although other phrases which meant strictly and precisely the same thing, and even the demand of a total loss, have been sometimes held to be sufficient. The cases upon this point are conflicting, both in the *English* and *American* courts, the rule being somewhat stricter in the former, but looking at the cases as a whole, I am of opinion that the parol abandonment by the plaintiff, coupled with the

exhibition of the captain's letter of 6th *March* and the claim for a total loss, was enough to satisfy the law. I think, also, that it was in time, though the sale on the 15th *March* reduced it to a mere form, and gave the underwriters no opportunity of repair and no option. For my own part, I acquiesce in the doctrine as laid down by *Parsons*, vol 2, p. 119, and sustained by the *American* cases, that if after an abandonment, but before the underwriters can take possession, the master sells the vessel, this act will be considered as done by him as agent of the underwriters, and if the facts at the time of the abandonment showed the loss to be total, that is, as I take it, either absolutely or constructively total, the sale, being *bona fide*, will not in any wise affect the rights of the assured. *Bryant v. Com. Ins. Co.*, 6 Pick., 131. I am of opinion, therefore, that the verdict for the plaintiff as to the vessel should be sustained.

I think, also, that the verdict for the defendant as to the freight should be upheld, though my impression at the argument leaned the opposite way. It was alleged by the defendant's counsel that the claim for freight was abandoned at the trial, and, although this was denied, the argument was not as full or as earnest as might have been expected if the claim for freight were seriously urged, and a re-argument might have been held by the Court to be advisable.

There is no question that the master had the right to tranship the cargo as in this case, and carry it on to the port of destination. Whether he was bound to do so when he had a right to abandon his ship is a different question, on which the authorities are by no means agreed. In doing so he earned his freight, but at a considerable outlay, and the point is, who is to lose this outlay, the ship-owner, the freighter, or the underwriter, and which underwriter, on goods or on freight? These are very complicated and interesting inquiries, illustrated by many cases which I am not called upon to examine with the same minuteness as if they had been presented to us in argument. Most of them are to be found in *Parsons on Marine Insurance*, vol. 2, pp. 154, 274, 404. In the last of these citations it is said: "If the cost of transshipment exceeds the whole freight (which was not the case here) the insurers are liable only for the freight they insure. The

shippers of the goods are, however, liable for the excess (an idea which appears never to have occurred to the master of the *Ida C.* nor to his co-owners). And then it may be a question whether the insurers or the goods are not liable for this loss. It cannot be said that the law on this point is conclusively settled."

In *Shipton v. Thornton*, 9 Ad. & El., 336, 337, decided in 1838, there is an able judgment of Lord Denman, containing the following passage: "One question has been asked which it will not be right to pass over. 'What,' it has been said, 'in case of the cargo of a disabled ship, if the transshipment can only be effected at a higher than the original rate of freight, which party is to stand that loss?' By the *French* ordinance and the Code de Commerce, and according to the decisions in *America*, the ship-owner is entitled to charge the cargo with the increased freight, and as a consequence of that rule it becomes an average loss, and in case of an insurance must be made good by the insurers. (He does not say whether on goods or on freight.) No case of this sort that we are aware of has occurred in *England*, nor is it necessary for us to express any opinion on it." Kent, in his Commentaries, 9th ed., vol. 3, p. 438, says that the *French* rule is to charge the extraordinary expense and the extra freight upon the insurer of the cargo, and that the *American* courts have followed that rule, which is still undecided in the *English* cases. And in the leading case of *Searle v. Scovill*, 4 Johnstone's Ch. Reps., 222, Kent, Chancellor, said: "Upon the decisions (that is the *American* decisions) there can be no doubt of the authority of the master, in a case of necessity, to hire another ship at a foreign port, and in the character of agent to charge the cargo with the extra freight of such renewed voyage, but the owner of the goods is not responsible for the old and new freight united.

In the case of *DeCuadra v. Swann*, 16 C. B., N. S., 772, decided in 1864, the case raised by Lord Denman in *Shipton v. Thornton*, is treated by the counsel as still undecided, and on the *French* rule being cited, Williams, J., observed that it was only a doubtful statement of the law. There is a class of cases, *Great I. P. Railroad Co. v. Saunders*, 1 B. & S., 41; *Booth v. Guir*, 15 C. B., N. S., 201; *Kidston v. The Empire*

Marine Ins. Co., L. R., 1 C. P., 535; 15 L. T., N. S., 12, in the Common Pleas, and L. R., 2 P. C., 536; 16 L. T., N. S., 119, in the Exchequer Chamber, especially the last, on which the plaintiff might have insisted, and perhaps successfully, that he was entitled to recover the freight paid on transhipment under the suing and laboring clause in the policy on freight, as set out in the second count and produced on the trial but not at the argument. The last and most material of these cases differs from the present in the terms of the policy, in the form of the declaration, which contained a second count on the suing and laboring clause, and in some other particulars, but is worthy of note as the first judicial decision in the *English* courts on the true construction of the above clause, and establishing in fact a new rule, without reference, however, in either judgment to the case of *Shipton v. Thornton* or the *American* authorities I have cited.

In the case in hand, the plaintiff having made no claim under the suing and laboring clause, either at the trial or argument, we could not give him the benefit of it without a re-argument, to which, under the circumstances, we do not think him entitled.

Both rules therefore, as I think, for a new trial, should be discharged, and as both parties have failed in the rules they respectively took, there should be no costs on the argument.

JOHNSTONE, E. J.—There is no doubt that the condition of the vessel at *Bermuda*, having consideration to the relation the expense of repair would have borne to the value of the vessel when repaired, justified abandonment by the owners to the underwriters, and I assume for the present that notice of abandonment was given. But I have no doubt that the master acted illegally in selling before the sense of her owners or underwriters could be known, being as he was at a place where the vessel was in perfect safety, and from where to *Nova Scotia* a regular communication existed.

The question on which the case, in my mind, turns is this whose agent was the master when he made the unauthorized sale? and that again depends on the question whether the sale was made before or after the notice of abandonment. A justifiable abandonment transfers the ship to the underwriters,

and the right to the sum for which she was insured to the owners, and the master from being the agent of the owners becomes the agent of the underwriters. If then the sale was made after the abandonment it was made by the master as the agent of the underwriters, and gave them a remedy against him for his wrongful act, and against the purchaser for recovery of the vessel, but it could not affect the original owners, or the right to recover the debt which was vested in them by the abandonment, and the plaintiff would therefore be entitled to hold his verdict. If, on the other hand, the sale was made before the notice of abandonment to the underwriters, it was the act of the agent of the owners, and inasmuch as it deprived the underwriters of the benefit they were entitled to under the abandonment, of repairing the vessel or otherwise dealing with her, it made the abandonment ineffective, and consequently the owners were not entitled to any benefit from it. They continued the owners of the vessel without claim on the underwriters, and therefore the plaintiff would not in that case be entitled to the verdict, and a new trial must be had. Now it seems from an accurate consideration of the evidence that the sale was made before abandonment to the underwriters, or at the best, that the fact is doubtful. Inasmuch as the fact is essential to the plaintiff's case it is incumbent on him to remove the doubt, and therefore I am of opinion that there should be a new trial to ascertain the fact. I think also that a new trial should be had for the fuller examination of the question of freight, in the light of the decision in *Kidston v. Empire Marine Ins. Co.*, L. R., 1 C. B., 335, and L. R., 2 C. B., 363.

WILKINS, J.—At the trial of this cause, which took place before me, I entertained a strong opinion, upon my then impressions of general principles, in favor of the defendant; and subsequent research has confirmed it. Without occupying much time I can state my conclusions and the reasons on which they are founded. That the subject of the insurance—the vessel—was, from the perils insured against, a constructive total loss, is clear from the first finding of the jury, which has sufficient support in the evidence. Being a constructive total loss, due notice of abandonment to the underwriter was an

essential condition to the plaintiff's right to recover, unless there be some proved circumstance in the case which would in respect of a necessity for such notice take the case out of the now established rule of law and dispense with a compliance with it. If such notice was necessary the burden of proof that it was duly given is on the assured. *Knight v. Faith*, 15 Ad & El., N. S., 649, a case which is cited without question in *Gruinger v. Martin*, 4 B. & S., 9, is decisive to show that where, as here, there has not been an actual total loss, but a constructive total loss, the insurers can only be rendered liable for the sum insured by a notice of abandonment. In that case there was no notice of abandonment given at all, but the reason stated for the legal necessity of giving it applies equally to a case (which is this case) where a notice has been given but not duly given, or so given that the assureds could not derive that benefit from it which the law contemplates in their behalf when it requires it as a condition of a right to recover from them the amount of the insurance. Lord *Campbell* says, in words which have a direct application to the case before us, "If the subject matter insured remains in specie, though in a damaged state, a notice of abandonment is as necessary to entitle the assured to make a claim as if it had actually been destroyed." And then giving the *rationale* of the legal requirements his Lordship proceeded thus: "With respect to insurance on a ship this condition is imposed by the law to give the insurers the means of guarding against fraud, to enable them to repair the ship if they should deem such a proceeding for their advantage, and to secure to them all the advantages to which, if liable for a total loss, they would be entitled as owners of the ship, from the time when the damage is sustained to which the loss is ascribed." This is very precise language, but Lord *Campbell* goes further, and cites with approbation these words of Lord *Abinger's* masterly judgment in *Roux v. Salvador*. Lord *Abinger* said: "There may be some peril which renders the ship unnavigable without any reasonable hope of repair. In this and similar cases if a prudent man, not insured, would decline any further expense in prosecuting an adventure the termination of which will probably never be successfully accomplished, a party insured may for his own benefit, as well as that of the under-

writer, treat the case as one of a total loss, and demand the sum insured." "But," continued Lord Abinger, "if he elect to do this, as the thing insured or a portion of it still exists and is vested in him, the very principle of the indemnity requires that he should make a cession of all his rights to the recovery of it, that the underwriter may be entitled to all the benefit of that which may still be of value, and that he may, if he pleases, take measures at his own cost for realizing or increasing that value." After this no further authority need be cited on the point of inquiry, but Lord Chancellor Cottenham said, in *Stewart v. Greenock Marine Insurance Co.*, 2 H. L. C., 159, "In all cases in which the subject is not actually annihilated the assured is entitled to claim, and claiming as a total loss, must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging and incident to it." It is of the utmost importance in this case to inquire when, relatively to the time of sale of the vessel, the notice was given. The *onus* of showing it precisely is on the assured. If it be not shown, it was, in effect, no notice at all. When it was given, unless we are to consider it first given on receipt by plaintiff of *Hines'* second letter of the 15th *March*, which accompanied the protest, is left in perfect uncertainty. If then first given it was not given until after the sale. If it was first given on receipt of the captain's first letter of the 6th *March* we have reason to believe that it was not given until after the sale, for the plaintiff says, rightly or unrightly, "in about ten or twelve days a letter mailed at *Bermuda* would reach *Halifax*." That letter, then, if dispatched on day of its date by a man-of-war, which the plaintiff says brought it, could not have reached *Liverpool* before the 16th, or two days after the sale. "That notice of abandonment relatively to the time of giving it is insufficient in law if it does not give the underwriters an opportunity of electing to repair the ship," was a contention of counsel for the assurers in *Granger v. Martin* in the Exchequer Chamber, reported in 4 B. & S., 9. That contention was affirmed by the L. C. Baron, *Erle*, C. J., *Williams*, *Channel* and *Wilde*, in giving judgment in that case. It is noticeable that there the master sold the ship for the benefit of all concerned, and the contention of defendant's counsel "that the master, if he intended to

abandon, had no right to sell the ship, which was lying safely in harbour, without the authority of the underwriters," was not repudiated or questioned by the Court. But even if it reached *Liverpool* on the sixth day after it was written it was not a good notice, for it could not have been made available by the insurers. It only remains, then, to inquire whether the actual sale of the vessel at *Bermuda* by the master under the circumstances had the legal effect of dispensing with a notice of abandonment. In *Knight v. Faith* (supra), the plaintiff's counsel took that very ground, relying on the sale of the ship by the master. And that followed which in my judgment is, in view of the facts, and especially of the second special finding of the jury, conclusive to show that the sale by the master in this case did not render a notice of abandonment unnecessary. The following are Lord Campbell's words in the judgment of the Court pronounced by him: "The plaintiff's counsel then relied upon the sale of the ship by the master. Whether notice of abandonment may be dispensed with where there has lawfully been a sale by the master we are not now called upon to decide. Where she is reduced to a mere wreck the solution of this question may be clear enough. Where she still retains her character of a ship it may be attended with difficulty, but here we are of opinion that as against the insurers the sale is not shown to be lawful." Now, then, we arrive at a point of interest, being about to ascertain why that sale was not deemed lawful as against the insurers. The reasoning of the court in that case, if we apply it to this, in connection with the second finding, will be found conclusive to show that the sale by the master in this case was not lawful, because not necessary. The Judge who tried this cause submitted to the jury this question, "As that vessel lay in the harbour of *St. George's*, at *Bermuda*, could she have been so secured there with safety in regard to the interests of all concerned with her safety, as that, leaving her in that harbour, a notice of abandonment could have been given to the insurers at *Liverpool* so that they could, had they thought proper so to do, have accepted the abandonment, and taken possession of the vessel, and repaired her? The jury answered it in the affirmative, and the vessel remained in that situation of security at the moment when the master made

sale of her. There was therefore not only no urgent necessity for selling her, but no necessity at all. If then urgent necessity alone could make a sale by him lawful, his sale of this vessel was not lawful.

Now, then, let us consider Lord Campbell's reasons for deciding that the sale by the master in the case before him was not lawful. His Lordship proceeded to say: "It must be borne in mind that she still remained in the character of a ship capable of being repaired, if there had been the means of repairing her at *Santa Cruz*, and that she might have been sent to other places where she might have been repaired, although not prudently. Could Mr. Ware, the master, who is a part owner, one of the assured, and a plaintiff on the record, under these circumstances sell the ship, and without notice of abandonment render the insurers liable for a total loss? The master's right to sell arises only in a case of necessity, which must be clearly shown, with full proof that everything was done *bona fide*, and for the real benefit of all concerned." Here his Lordship cited several cases; among the rest *Idle v. The Royal Exchange Assurance Co.*, 8 Taunt., 755, where the jury found that the master in selling the ship had acted fairly and *bona fide* for the benefit of all concerned, and that the sale was honestly, fairly and properly conducted. The Court upon a writ of error from the Court of Common Pleas, held that the necessity and legality of the sale was not to be inferred from this finding." His Lordship continued: "In *Robertson v. Clarke*, 1 Bing., 445, where a sale by the master was upheld, Lord Gifford said: 'This principle may be clearly laid down, that a sale can only be permitted in case of urgent necessity, that it must be *bona fide* for the benefit of all concerned, and must be strictly watched.' It is not disputed that the sale was *bona fide*, and it is clear that it was for the benefit of all concerned. I agree that it is not sufficient to show that it was *bona fide* and for the benefit of all concerned, unless it be also shown that there was urgent necessity for its being resorted to." It follows then (these are my humble words) that urgent necessity alone could make lawful as against the defendant underwriter this sale at *Bermuda* by Captain Hines. The existence of such necessity is absolutely negatived by the fact that the vessel capable of being

repaired (and afterwards repaired in fact) at the time of the sale, was safely moored in harbour at *St. George's*.

As regards the plaintiff's claim on the freight policy, it is thus decided in the *Scottish Marine Insurance Co. v. Turner*, 1 Macq., H. L. C., 334, *Fisher's Dig.*, 4727, viz., that on a freight policy the insurers are not held responsible where freight has been earned. I am therefore of opinion that the defendant's rule *nisi* obtained for setting aside the verdict for the plaintiff on the ship policy should be made absolute, and that the plaintiff's rule *nisi* to set aside the verdict given for the defendant on the freight policy should be discharged.

GREEN ET AL. v. HARE.

A witness for plaintiffs was allowed to leave the Court on the understanding that he would immediately return if sent for. The cause being called, the witness was sent for and proceeded toward the Court, but returned home on being informed by some of the jurymen in the previous case that the Court had adjourned for the day. The witness not appearing plaintiffs applied to have his evidence taken at a future day. This being refused and the evidence being material they became nonsuit. Under the circumstances, and it appearing that the plaintiffs did all that was necessary to obtain the attendance of the witness, a new trial was granted on payment of costs.

DODD, J., now, (July 1st, 1872.) delivered the judgment of the Court:—

This was a rule for a new trial upon the grounds of the absence of a material witness at the trial of the cause. The cause was tried during the last sittings at *Halifax*, before a Judge without a jury by consent. The facts were as follows: One *Hadley*, a witness for the plaintiffs, had been in attendance in Court, and it being doubtful if the cause would be tried during the day, by an agreement between him and *Foster*, the plaintiff's attorney, he was permitted to return to his home in the city, and if the cause was called for trial during the day, he was to be sent for, and in that case immediately return to Court. There not being a sufficient number of jurymen in attendance for the trial of a previous cause, those in attendance were discharged, and this cause taken up by consent, it then being near four o'clock, and the witness sent for, who on receiving the message immediately proceeded towards the

Court, when meeting the jurymen that had been discharged, and they informing him that the Court had been adjourned for the day, he returned to his own home, believing it would be useless then going to the Court. About this time, it appears by *Foster's* affidavit, the cause had been taken up, he then supposing his witness would be in attendance in sufficient time to give his evidence before he closed his case, but at the close the witness not having appeared, and a nonsuit being moved for, he asked for delay in expectation that his witness would shortly be present, but not appearing he then requested the Judge to allow his evidence to be taken at a future time. This being refused he became nonsuit. He further states in his affidavit that the only point in his case that was not clearly made out to entitle him to a verdict was the identity of the defendant, and this as appeared by the affidavit of *Hadley*, he could have established. He says before the commencement of the suit he called at the place of business of the defendant to request payment of the account upon which this action is brought, and that the defendant then most distinctly admitted having received the goods charged therein from the plaintiffs. At the argument of the cause the counsel for the defendant contended that as plaintiff had proceeded with the trial of his cause and took the risk of obtaining a verdict, he could not afterwards complain it was against him in consequence of the absence of a witness. That he should have applied to have the trial put off, and not proceeded with it. I admit that to be the general rule, but each case must depend upon the particular circumstances of it. Where a verdict was found against defendant, and a material witness arrived next day for him, the Court refused to grant a rule for a new trial because no application had been made to put off the trial. *Elmslie v. Wildman*, 8 Taunt., 236. The general rule is that a new trial will not be granted on the ground that evidence has not been given. *Cooke v. Berry*, 1 Wils., 28; note a, *Turquand v. Dawson*, 1 C. M. & R., 710. Where an application to put off the trial before the under sheriff was made after the jury was sworn on the ground of the absence of a material witness, and refused, the Court would only grant a new trial on payment of costs. *Packham v. Newman*, 3 Dow. P. C., 165. The cases all adopt the

general principle, more or less with modification when the circumstances justify it. Here the plaintiffs could have declined bringing their cause on for trial, as it did not stand first for trial on the docket, but as it was to be tried without a jury, their attorney feeling confident of the attendance of the witness, proceeded with it, and once proceeding with the trial he could do no more than he did when he found his witness not present, that is to ask the Judge to receive his evidence at a future time. If the witness had not been misled by the information he received from some of the jury then coming from the Court that it had been adjourned he would have been present to give his evidence in the cause. Under those circumstances, and as it appears to me the plaintiffs did all that was necessary to obtain the attendance of the witness, I think the rule for a new trial should be made absolute, but upon the plaintiff paying costs.

SMITH v. McEACHERN.

PLAINTIFF supplied defendant with merchandize, and, among other things, with intoxicating liquors in quantities of less than one gallon delivered at one and the same time. Defendant on the other hand supplied plaintiff with articles which were placed to his credit in plaintiff's books of account. On a settlement of accounts plaintiff struck out of his account all charges for liquors supplied as above, and, with defendant's consent, deducted a like amount from the latter's credits by way of payment for the liquor. Defendant having given a promissory note for the balance,

Held, That the note so given was not void under Revised Statutes, (3rd Series), chapter 19, being neither for nor to secure intoxicating liquors in any quantity as forbidden by the statute. The statute being restrictive of the common law and of a penal character must receive a restrictive construction, and on no account should be construed to mean other than the plain ordinary meaning the words would convey.

McCULLY, J., now, (July 1st, 1872,) delivered the judgment of the Court:—

This was an action brought to recover the amount of a promissory note made by defendant to plaintiff, dated the 25th day of *January*, 1862, for £45 0 7, tried before Mr. Justice *DesBarres*, in *June*, 1871, at *Port Hood*. The controversy and facts were substantially as follows: *Smith*, the plaintiff, was a merchant, and *McEachern* was one of his customers. The plaintiff kept a running account with defendant, supplying him with merchandize on credit, and among other things with

intoxicating liquors in quantities of less than one gallon delivered at one and the same time. Defendant on his part supplied plaintiff with articles which plaintiff had placed to his credit in his books of account, where he kept a debit and credit account. On a settlement had at the date of the note, plaintiff struck out of his account all the charges for intoxicating liquors in quantities less than a gallon and delivered at one and the same time, and deducted a like amount from defendant's credits by his consent, "by way of payment for the liquor supplied," whereby the balance remained the same as if no deduction had been made on either side.

The facts of this case are not in controversy. The defence set up was the 16th clause of chapter 19 of the *Revised Statutes* (3rd series), which enacts that no person shall recover, or be allowed to set off any charge "for intoxicating liquors in any quantity less than one gallon delivered at one and the same time, and all specialties, bills, notes, agreements, or accounts stated, given or made in whole or in part, for, or to secure any such charge, shall be void." "It shall not be necessary for every person wishing to take advantage of this clause to plead the same specially, but advantage may be taken thereof at any stage of the trial on motion for a nonsuit."

Defendant's counsel at the close of plaintiff's case moved for a nonsuit, which the Court ordered. Plaintiff refusing to become nonsuited, defendant called him as a witness, and the substance of his testimony is given above. The jury found a verdict for defendant, in accordance with the Judge's charge. The plaintiff obtained a rule to set this verdict aside for misdirection and as against law and evidence. The sole, single point raised on the trial and argument was this,—is this note, which is drawn in the ordinary form and made payable by defendant to plaintiff, void under the statute? I am of opinion that it is not. That the note as it exists is neither "for" nor to secure "intoxicating liquors in any quantity," as forbidden by the statute. Unless the affirmative of the proposition can be maintained, there is no case made out on the part of defendant to render the note void.

It does not appear by the minutes of the learned Judge who tried the cause of what the defendant's credits consisted.

But suppose for argument's sake that they were in part charges of a like kind as those struck out of plaintiff's account, could it be contended that the two parties, plaintiff and defendant, could not weed out all such objectionable items and then strike a balance, and if so, that a note taken for such a balance was void? I apprehend not.

It may be said that it is an ingenious device to avoid the operation of the statute. But if it be so, is it competent for defendant now to complain of that to which he gave his assent, and which he followed up by giving to plaintiff a promissory note? If the defendant had not consented, as he confessedly did, for it is not contended that there was any duress of any kind, had he withheld his consent, and refused a promissory note or settlement, still plaintiff could certainly have recovered for the other items of his account. That was not controverted at the argument.

The cases cited in favor of defendant's contention have no application to the state of facts here. By defendant's consent plaintiff struck out every charge for liquor in his account, and by the like consent threw off an equal amount of credits. Neither in whole or in part has this promissory note now any amount, the smallest, "for intoxicating liquors sold or delivered contrary to the statute." *Judicis est jus ducere, non dare*, is a wholesome maxim. If it had been the desire of the Legislature to have rendered the whole of any account void where intoxicating liquors constituted a part, the language of the statute would have so declared and enacted. With every desire to control the liquor traffic and restrain it within legislative limits, ready and willing and prepared to enforce all the penalties imposed by the statute upon those who controvert it, I am unable, nevertheless, to go further than its plain, unequivocal language warrants.

The note in question as it at present exists contains no charge for intoxicating liquors forbidden by the statute, and is therefore legal and good. In a penal enactment where it is sought to depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a larger or more popular sense must plainly appear. *Stephenson v. Higginson*, 3 H. L. C., 638. The intention of the Legislature must be ascertained from the

words of a statute and not from any general inferences to be drawn from the nature of the objects dealt with by the statute. *Fordyce v. Bridges*, 1 H. L. C., 1. The Court knows nothing of the intention of an act except from the words in which it is expressed, applied to the facts existing at the time. *Logan v. Courtown* (Earl), 13 Beav., 22. The language of a statute taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing its enactments. *Philipott v. St. George's Hospital*, 6 H. L. C., 338.

The common law rights of the subject in respect to the enjoyment of his property are not to be touched upon by a statute unless such intention is shown by clear words or necessary implication. *Reg. v. Mullow Union*, 12 Ir. C. L. R., 35—Q. B.; *Fish. Dig.*, 8208. Statutes restrictive of the common law receive a restrictive construction. *Ash v. Abdy*, 3 Swans., 664. Chapter 19 of the *Revised Statutes* is highly penal in many of its clauses, and restrictive of common law in letter and spirit. By the principles that obtain and govern in the construction of statutes, this chapter must in all its parts receive a restrictive construction, and on no account should be construed to mean other than the plain ordinary meaning the words would convey.

For these reasons I am of opinion that the rule for a new trial should be made absolute.

McNAB v. SAWYER.

PLAINTIFF brought replevin against defendant, a sheriff, for goods taken on execution, but claimed by plaintiff under a registered bill of sale from the party against whom the execution issued, and who was suffered to remain in possession. The principal question on the trial was the *bona fides* of the bill of sale, and, the jury having found for the plaintiff,

Held, notwithstanding suspicious circumstances, that their verdict could not be set aside. *Also*, that the plaintiff who had had a symbolic delivery, and had a right to immediate possession, had sufficient possession to maintain the action.

SIR W. YOUNG, C. J., now, (July 1st, 1872,) delivered the judgment of the Court:—

This is an action of replevin for goods taken on execution and claimed by the plaintiff under a registered bill of sale from *McKie*, against whom the execution issued. The prin-

central question on the trial was the *bona fides* of the bill of sale, and the jury having found for the plaintiff we think that notwithstanding some suspicious circumstances the verdict can not be disturbed. Part of the goods in the bill of sale were delivered to the plaintiff, but the goods levied on were left in possession of *McKie*. The plaintiff had a right at any moment to take them out of his possession. There was a symbolic delivery of all the goods to the plaintiff a few days after the bill of sale was executed, and his absolute right to the possession of the whole was acknowledged. Under these circumstances it was urged that replevin would not lie. It was admitted on the authority of *Ring v. Brennan*, James Reps., 20, that a third party whose goods were taken on execution could maintain replevin against the sheriff or other officer, but here it was said that *McKie* was in possession and not the plaintiff, and that a possessory right without possession was not enough. I accede to that proposition, but am of opinion that the possession of *McKie* was the possession of the plaintiff, for which the case of *White v. Morris*, 11 C. B., 1028, 34, is an authority. The vendee under a bill of sale was held in that case to have sufficient possession to maintain trespass, and if so he can avail himself of the more complete and effective remedy afforded by replevin. Another difficulty arose upon the trial in the discovery then made, that part of the goods in the writ of replevin were not in the bill of sale. These the plaintiff's counsel disclaimed, and they are probably of trifling value. It was uncertain, too, what goods had been actually levied on, and we think it the better course to refer these matters to a master, should the parties think them worth the trouble and cost of inquiry. The defendant is entitled to judgment on the record for any goods levied on and not included in the bill of sale, and we have framed a rule securing him that right.

FROST v. BRENNAN.

WHERE a promissory note is defective for want of a stamp the plaintiff may recover the amount of the consideration on a count for account stated, notwithstanding that the consideration of the note is for an interest in land.

DODD, J., now, (July 1st., 1872,) delivered the judgment of the Court:—

This cause was tried before Mr. Justice *Wilkins*, at *Halifax*, at the sittings of the Supreme Court in *October* term, 1871, when a verdict was found for the defendant. A rule nisi was granted for a new trial, and the cause was argued during the present term. The action was on a promissory note, and on an account stated. The particulars of plaintiff's claim are as follows:

1870.

July 22-25.	To amount of note.....	\$400 00
	Drawn January 22nd, due this date, Oct.	
	8th, interest to date	17 50
		<hr/>
		\$417 50

The plaintiff seeks to recover the above amount upon an account stated.

The defendant pleaded to the first count on the note, that he never made the note, and to the account stated that he never was indebted. There are several other pleas, but upon the issues raised by the two I have mentioned, the cause was argued. Upon the issue on the note an important question arose, at the trial and also at the argument, as to the right of the defendant to offer as a defence, that the note, when made, was not stamped or insufficiently stamped, the plaintiff contending that the want of stamps could be taken advantage of only by plea denying that the note was stamped, while the defendant rested upon *English* cases to prove that under his plea, that he never made the note, he could show the want of stamps. In this case it becomes unnecessary to decide the question, as we are of opinion that the plaintiff is entitled to recover for his particulars on the account stated. It will only be necessary to refer to one or two cases to show that if the note is defective for the want of a stamp, a plaintiff can

recover the consideration of the note upon his account stated. When the note has not the proper stamp so that it can be given in evidence, the plaintiff may go into the evidence of the debt for which it is given; *Wilson v. Kennedy*, 1 Esp., 245; *Brown v. Watts*, 1 Taunt., 353; where the particulars of plaintiff's demand was a promissory note only, on its being produced in evidence it was improperly stamped and could not be given in evidence, though the party could be allowed to give the consideration in evidence, he shall be precluded by his particulars. Lord *Kenyon* said when an instrument produced in evidence has been found to be improperly stamped, I have admitted evidence of the consideration, and I should do so here if the plaintiff had not precluded himself by his particulars; *Wade v. Beasley*, 4 Esp., 7; and in *Hedley v. Bainbridge*, 3 Q. B., 316; a declaration on a promissory note with a count on account stated. The Court held the particulars were insufficient to enable the party to give evidence of the account stated, the note being invalid. In the present case the same difficulty does not arise that did in *Hedley v. Bainbridge*. There the particulars did not refer to the consideration of the note so as to recover under the account stated. Not so in this case. The particulars not only claim the amount of the note, but also the consideration of it, under the account stated. The evidence of *Nash* and also that of plaintiff prove what the consideration was. The plaintiff, having purchased real estate in the City of *Halifax*, agreed through *Nash* to transfer the purchase to the defendant for the sum of four hundred dollars in advance of his purchase, and the surrender of the property to defendant. Upon the part of the plaintiff the agreement was performed. The subsequent admissions of the defendant by letters and otherwise admitted the \$400 to be due on the transaction, and for which the note in suit was given to plaintiff. An absolute acknowledgment by the defendant of the plaintiff's claim can be recovered under the account stated, so an oral admission of a debt for goods sold is evidence of an account stated, though the agreement for the sale was in writing, *Newhall v. Holt*, 6 M. & W., 662. When the contract was not in writing, as required by the *Statute of Frauds*, the plaintiff may sometimes recover on account stated, as by proving after the

defendant had been let into possession of a farm by the plaintiff under a parol agreement to give £100 for it, he acknowledged that he owed and promised to pay the plaintiff that sum. *Cocking v. Ward*, 1 C. B., 858. So where plaintiff and defendant met and went through their cross accounts, and ascertained that the plaintiff owed to the defendant £111, and the defendant to plaintiff £67, leaving a balance of £44 in defendant's favor, and it was then verbally agreed between them that the defendant should purchase of the plaintiff his interest in some land for £70, and ultimately that the balance in the plaintiff's favor should be taken at £22, the defendant having obtained possession of the land accordingly, it was held the plaintiff could recover the agreed balance on an account stated. *Laycock v. Pickles*, 4 B. & S., 497. These last cases cover that under consideration, and show notwithstanding the consideration of the note is for an interest in land, the defendant having admitted the debt and promised to pay it, the plaintiff is now enabled to recover it under the count on account stated. The rule for a new trial must, therefore, be made absolute with costs.

MANNING v. BOWMAN.

M. BROTHERS, prior to making an assignment under the Insolvent Act, transferred certain policies of insurance to the plaintiff to whom they were largely indebted for advances. The assignee having claimed the insurance, the insurers applied for and obtained an interpleader.

Held, That though policies are usually assigned in writing, a mere verbal assignment with delivery gives the assignee an equitable right to the proceeds.

Also, That in cases of interpleader a Court of law may consider the equitable rights of the parties.

RITCHIE, E. J., now, (July 16th, 1872,) delivered the judgment of the Court:—

It appears from the evidence in this cause that *Manning Brothers* who were doing business in this Province, became largely indebted to *Thomas Manning*, who was engaged in business at *Boston*, for advances made by him to the firm, and he having required security, they gave him a mortgage on their property on the 1st August, 1869.

On the 28th *May*, 1869, *Manning Brothers* effected insurance against fire on their property in the office of the *Liverpool, London and Globe Insurance Company*, and on the 25th *January*, 1870, they effected a further insurance in the same office; and *Thomas Manning* having required that the property should be insured for his benefit, they, on the 14th day of *March*, 1870, took out a further policy in the same office, which, in its terms, was made payable to him as mortgagee in case of loss, and the two other policies were made payable to him by the indorsement of the agent of the company dated the last mentioned day. The three policies were subsequently transmitted to *Thomas Manning*, who held them at the time of the loss by fire of the property insured, which took place on the 14th *May*, 1870.

There is no evidence whatever to throw doubt on the *bona fides* of the debt from *Manning Brothers* to *Thomas Manning*, nor is there any evidence to lead to the inference that the firm was insolvent either when the mortgage was given or the interest of policies transferred or that the transfer was made in contemplation of insolvency.

On the 30th *May*, *Manning Brothers* became insolvent and made an assignment under the Insolvent Act.

After the fire had taken place application for payment of the loss was made by *Thomas Manning* on the agent of the insurance company and a protest against such payment was made by *Bowman*, who claimed the amount as the assignee of *Manning Brothers*, and a suit having been instituted against the company, who did not dispute the loss and were willing to pay the amount to the party entitled to receive it, they applied to the Court to award an interpleader, which was granted on their paying into Court the sum in controversy, and it was ordered that *Thomas Manning* and *Maynard Bowman* should proceed to the trial of the issue to enquire whether *Maynard Bowman*, assignee of *Manning Brothers*, is as against the plaintiff entitled to the said sum being \$400.

On the argument we were all of opinion that the only question upon which any doubt could be entertained after a verdict in favor of the plaintiff was, whether there was such a transfer of the two policies originally made payable to *Manning Brothers* as would entitle him, in this action, to

recover the amount insured by them. As regards the other policy made payable to him as mortgagee, we felt that his right to recover under it was settled by the case of *Brush v. The Aetna Insurance Company*, decided some time since by this Court.

Fire policies cannot be transferred from one to another without the consent of the insurer, yet when that consent is obtained the transfer will be upheld. It may be that such an assignment would be deemed only an equitable one, and in a Court of law the action on it should in general be brought in the name of the assignor; but where, as in this case, the amount in the event of loss has been made payable to the assignee by the insurers at the instance of the assignor by an endorsement to that effect on the policy, and thus a privity established between the insurers and the assignee, I am not prepared to say that an action could not be maintained by the assignee himself, for the insurers have expressly undertaken to respond to him. See *Angel on Fire and Life Insurance*, 246-6; *Phil. Insur.*, 62.

It was contended on the part of the defendant that there was in fact no assignment of the policies in this case as no deed or instrument in writing had passed between the parties, but though policies are usually assigned in writing, yet a mere verbal assignment with delivery of the policy gives to the assignee an equitable right to the proceeds. See 11 *M. & W.*, 10. And after such an assignment and delivery of the policy with the consent of the insurer in the case of fire policies, the assignor cannot, by any act of his, intercept or prejudice the rights of the assignee. See 1 *Phill.*, p. 60. It is impossible, therefore, to hold that there has not been at least an equitable assignment, and, assuming that *Thomas Manning* only took an equitable one under it, and that, to assert his right against the insurers in a court of law he would be required to bring an action in the name of the assignor, can *Bowman*, the assignee of *Manning Brothers*, raise the question on the issue before the Court under the interpleader order? Upon this point I had some doubt on the argument, and no authorities were adduced on either side in relation to it; I have, however, found one since the argument, which is strikingly applicable and establishes the principle

that, in an interpleader case like the present, a Court of law may consider the equitable rights of the parties. The case I refer to is *Rusden v. Pope*, L. R., 3 Exch., 277. In giving judgment *Martin, B.*, says: "The defendant is assignee in bankruptcy, and it is established that assignees take only that which the bankrupt was entitled to; the plaintiff has an equitable right, and therefore it did not pass to the assignee. The other question is a formal one, whether the plaintiff is to be driven into a Court of Equity to establish his rights. I agree that he could not maintain the action, *but the money is in Court and the question is, who is entitled to it?* and this question I will not refuse to try." *Churchill, B.*—"I am of the same opinion. I cannot agree with my brother *Bramwell* that we are not to try the substantial question between the parties, and that the only question we can determine is whether the plaintiff is entitled to maintain the action. The party had a clear right to interplead in Equity, and it would be a very narrow view of the interpleader act to hold that it was not intended to confer upon the Court a jurisdiction to determine equitable rights. The case does not rest on the fact of an action tried before a Judge on circuit, but on the fact that an interpleader order had been made and the money paid into Court, and that order having been made, jurisdiction is given to us to determine who is the person entitled to the money so paid into Court. That is the substantial question, and the assignee of the bankrupt can have no right to which the bankrupt was not entitled at law and *in Equity*." *Kelly, C. J.*, concurred.—"The substantial question is whether the plaintiff or defendant is entitled to the money paid into Court."

We are relieved by the authority of this case from the technical difficulty in the way of the plaintiff's recovering in this action, who is really entitled to the money in dispute, and who, even if this defendant, who is not entitled to it beneficially, recovered in this action, would be entitled, by resorting to a Court of Equity, to compel him to pay back what a Court of law had not on mere technical grounds the power to award him.

We are all of opinion that the rule for a new trial should be discharged with costs.

THE STARR MANUFACTURING COMPANY (LIMITED)
v. FAIRBANKS.

DEFENDANT demised to the plaintiffs a water power derived from the Dartmouth lakes from which water was also drawn for the supply of a canal. The power demised was to be of no less extent than plaintiffs then enjoyed and as much more as defendant could spare after providing the water necessary for the working of the canal. Defendant having opened the sluice of the dam which retained the water, not for any needed use of the canal,

Held, that the water so expended was not expended within the exception in favor of the canal and was a violation of the plaintiffs' right to all the water with that exception.

Also, That defendant could not be permitted to raise the question whether the interference on his part was or was not practically injurious to the plaintiffs.

Personal service of a rule *nisi* is waived by appearance.

A demand is only necessary where something is required to be done, as money paid, deed executed, &c.

A rule *nisi* for an attachment for breach of an injunction need not state that it was granted on reading the injunction. All that is necessary is to produce the injunction in Court.

JOHNSTONE, E. J., now, (July 16th, 1872,) delivered the judgment of the Court:—

There being a difference of opinion on the bench on the judgment below, by which the defendant was declared to have violated the injunction, I will read from my opinion delivered then on that point, and which I have not seen reason to change: "It remains to dispose of the order *nisi* for attachment. In dealing with this I discharge from my mind the question raised as to the title to the bed of the stream. I give no opinion on that point. If the Company proceed with their purpose of laying down pipes, and their title is sustained by the Court above, they will have obtained the object they desire without delay, and which as far as I can see will be a material improvement to their works, while it will inflict no injury on *Mr. Fairbanks* or those claiming under him; and if their title is not sustained their labor and money will be thrown away. This risk they must assume. For the reasons I have given I cannot relieve them from it by determining the question of title. The sole question for me on this head is this,—has *Mr. Fairbanks* disobeyed the injunction by obstructing, interrupting, or otherwise interfering with the water privilege and power demised by him to the plaintiffs? This was to be of no less extent than they then enjoyed, and as much more as the said *Lewis P. Fairbanks* shall be able to spare after providing the water necessary for working the canal. All the water except what was needed for the canal

was thus demised to the Company. The defendant opened the sluice of the dam which retained the water used by the Company, and this he did not for any needed use of the canal. The water which from this cause was expended was therefore not expended within the exception in favor of the canal, and it follows that its expenditure was a violation of the plaintiff's right to all the water with that exception. I do not think I can inquire whether the water thus discharged at the particular moment left such a diminution in the quantity remaining as to work a practical injury at the time to the working of the plaintiffs' machinery. If the plaintiffs had a right to the use of all the water with a single exception, and the defendant had only a right to interfere with it within that exception, and if the injunction restrained the defendant from interfering with the plaintiffs' privilege, I do not think that the defendant can be permitted to raise the question whether or not a particular interference on his part was or was not practically injurious to the plaintiffs. All that I think we can ask is,—was the interference unauthorized? If unauthorized, it was forbidden. Still less can the defendant be allowed to justify the interference for the purpose of protecting himself against a supposed trespass. That clearly was not a ground of interference within the case, and I have already explained the reason why. I do not adjudicate on the claim of title set up by the defendant."

The defendant also took technical exceptions; these were: That the service of the rule *nisi* had not been shown to have been personal; and that it was not stated in the rule *nisi* that it had been obtained on reading the injunction; and that there should have been demand of possession. The first is sufficiently answered by the fact that the defendant appeared in person and by counsel, and that his counsel answered the rule *nisi* on its merits. 2 *Ch. Arch.*, 1582. In all cases, even when personal service is required, any irregularity in it is deemed to be waived by the party moving to order the rule, or appearing to show cause against it. But by thus appearing he does not waive any irregularity in the copy of the rule served, as that it is not entitled in the cause. At page 1718 it is distinctly said: "An objection to the to the want of personal service of the rule *nisi* is waived by

showing cause." *Levi v. Dunscombe*, 1 C. M. & R., 737, is a clear authority on this point. It was a rule *nisi* to show cause why an attachment should not issue for not delivering a bill of costs pursuant to an order which had been made a rule of court. Lord *Abinger*, C. B., distinguished between the service of the rule which imposed the obligation and the service of the rule *nisi* which called the party to explain his disobedience, and in giving judgment said: "This is not a proceeding having for its object the bringing a party into contempt. It is a rule calling upon him to show cause why he should not be punished for a contempt already committed." But even if it had been necessary that the rule should be personally served, the party having chosen to come into court the necessity for personal service is waived. The principle is perfectly familiar to any one who has been a reasonable time in Westminster Hall, that the effect of a party appearing who has not been regularly served is the same as if the service had been regular. The instances are numerous in the case of convictions and of civil proceedings, as reported in 3 *Dow. P. C.*, 447. His Lordship also said: "Though if no one had appeared the Court would probably not have made the rule absolute for an attachment except on an affidavit of personal service. A multitude of authorities might be cited. 1 *Tidd*, 500; 14 *M. & W.*, 731; 3 *Dowl. P. C.*, 583; 5 *R.*, 255.

The objection that there was no demand is inapplicable. It is only necessary when something is required to be done, as money paid, deed executed, &c. Here nothing was to be done. The defendant was called on to answer for what he had done.

In considering the objection relating to the proof of the injunction and of its service, it will be proper to examine the proceedings. The order and the injunction were served on the defendant by the sheriff on 22nd *May*, 1871, as appeared by the sheriff's return. On the 10th *July* the defendant obtained an order *nisi* to dissolve the injunction on his own affidavit and that of *H. Findly*, and on the papers on file which his counsel moved to make absolute on the merits. No suggestion being made that the injunction had not been regularly served.

Before judgment was given the plaintiffs' counsel obtained a rule *nisi* for attachment for certain acts set out in the affidavits on which the rule was obtained and which in the rule were alleged to be "*contrary to the injunction granted in this cause.*" Cause was shewn on technical grounds and on the merits. On this argument the injunction was produced, and, with the sheriff's return of service, read, and on the same day the defendants moved for and obtained a rule *nisi* for an injunction against the plaintiffs for an alleged violation of his rights, against which cause was shown.

I gave judgment on these three rules at the same time, discharging both the rule *nisi* to dissolve the plaintiffs' injunction, and the rule *nisi* for an injunction against the plaintiffs, and making absolute the rule for attachment. The merits I thought required these decisions, and an argument here has not changed my opinion. The technical objections are in the strictest degree formal, and cannot be urged with force in the circumstances of this case. The defendant's rule *nisi* brought all the proceedings before the Court, and by his affidavits and argument in their support he recognized the injunction and its service. The plaintiffs' rule *nisi* for attachment was stated to be founded on breach of the injunction, and the defendant's appearance by counsel and showing cause as I have shown waived any supposed irregularity of service.

It is a mistake to suppose that the Chancery practice requires that the rule *nisi* should have stated that it was granted on reading the injunction. All that is necessary is to produce the injunction in Court. 1 *Jac. & W.*, 376, and 3 *Craig & Phillips*, 108; and that was done and the service proved. But in fact the rule *nisi* did sufficiently refer to the injunction when it required the defendant to show cause against an attachment moved for on account of acts done "*contrary to the injunction issued in the cause.*" There are numerous cases where, under special circumstances, attachment may be ordered when no service of the injunction had been effected, as when a party or his attorney held guilty of contempt who had known that the injunction was issued though the injunction was not sealed. *Kimpton v. Eve*, 2 V. & B., 349, recognized in 18 *Ves.*, 524; 2 *Jac. & W.*, 265. Warrant of com-

mittal granted after the defendant had had notice of the order, though injunction was not sealed. 2 *Jac. & W.*, 265. So when the knowledge of the injunction was satisfactorily shown, as by a newspaper. *Lewes v. Morgan*, 5 Price, 518. Under the proceedings had in the case, and with the three rules before me for judgment, it would have been a great sacrifice of reason to technicality to have discharged the rule for attachment on any of the formal grounds taken by the defendant's counsel, and he cited no cases constraining to such a conclusion.

I cannot, therefore, feel justified in reversing the order for attachment. At the same time, as the object was mainly to prevent the defendant from rashly taking the law into his own hands in circumstances when most important interests might be jeopardized, I directed the plaintiffs' counsel when I made the order absolute not to issue an attachment without first applying to the Court, and I shall be pleased if the matter is not further prosecuted unless made necessary by the defendant.

The whole Court concurring in the opinion on the other causes of appeal, that the appeal should be dismissed, it is unnecessary for me to refer to them.



STEPHENSON v. COLFORD and BOGGS v. BENNETT.

Under Revised Statutes, (2nd Series) cap. 124, sec. 71, pleas will be set aside, when assailed on affidavit, and where they appear upon argument to be false, though a part of the pleas may be sustained. The defendant (unless in exceptional cases) should pay the costs of setting aside such pleas as are false, leaving the costs of moving to set aside such pleas as are sustained to abide the event.

SIR WM. YOUNG, C. J., now, (July 16th, 1872,) delivered judgment as follows:—

These two cases came recently before me at chambers. In the first the cause must go to the jury, but, on the affidavits, the first, second and third pleas are obviously false. In the second it is admitted that on part of the pleas the cause must go to the jury, and a rule *nisi* is asked to set aside the

remaining pleas as false. The practice on these points being undetermined, I thought it best to confer with the other Judges and lay down a uniform rule.

The *English* practice depends on the common law and the 52nd section of the *Common Law Procedure Act*, 1852, which last, as appears from a note to *Archbold*, 295, originated in the House of Commons, and differs widely from ours. The *English* cases collected in *Day*, 52, 54, and in *Archbold*, 292, have only a partial application here, and do not at all control our *discretion* in this Court. Here our chief inquiry is into the truth or falsity of pleas put in. In *England* the Judges have generally thought themselves debarred from that inquiry. In 4 *Dowl.*, 642 (1836), the plea was sworn to be false. *Tindale*, C. J.—‘It is clear that this is a plea upon which a distinct issue may be taken, and if we were to set it aside we should in effect be trying the case upon affidavit.’ In 4 *Dowl.*, 592, affirming 2 *B. & C.*, 81, *Patterson*, J., “I have not the power to set aside a plea which may or may not be true. The Court have retraced their steps and now never interfere unless defendant is under terms to plead usually, or under some special circumstances.” And in *Archbold*, edition of 1866, 292, the general rule is stated, referring to numerous cases, “that a Judge will not interfere and strike out a plea upon the mere ground of its being false, *although* the plaintiff swear that it is so.”

Our rule was first introduced in the *Practice Act* of 1853 by section 67: “The Court or a Judge shall, in all cases, have power to set aside frivolous or vexatious pleadings, and pleadings colorably amended, in pretended compliance with a Judge’s order to amend.” This was repeated in the second series of the *Revised Statutes*, fol. 497, but was superseded in the third series, fol. 527, by the present much more comprehensive clause. “The Court or a Judge shall, in all cases, have power, on such terms as to costs or otherwise as they shall think fit, to set aside, in whole or in part, false, frivolous or vexatious pleadings, and pleadings in pretended compliance with a Judge’s order to amend.” This has been acted upon by one or two of the Judges to a larger extent than by others, but the time is coming when it is absolutely necessary to enforce it. Pleas are put in every day without

the slightest regard to truth or falsity, and the time of the Court and jury is wasted, and the ends of justice sometimes defeated by the parties being compelled to prove what has never been disputed among themselves. A defendant pleads that he never made the note or bond or policy on which he is sued, though he did make it, and his attorney knows that he did, or might know if he chose to inquire, as he certainly ought. So a defendant pleads payment or satisfaction knowing that he has made neither the one nor the other. We are of opinion, therefore, that all pleas when assailed by the plaintiff on affidavit as at present, and appearing upon argument to be false, ought to be set aside as such, though a part of the pleas may be sustained, and that the defendant (unless in exceptional cases) should pay the costs of setting aside such pleas as are false, leaving the costs of moving to set aside such pleas as are sustained to abide the event.

In *Stephenson v. Colford*, I set aside the first, second and third pleas, the costs, as this is a new practice, to abide the event.

In *Boggs v. Bennett*, I shall grant a rule *nisi* to set aside part of the pleas, which will be made absolute as to such of them as may appear to be false, the costs, on the same principle also, to abide the event.

PATTERSON v. DUFFUS ET AL.

PLAINTIFF with his brother, the Rev. G. P., entered into a promissory note on Nov. 30th, 1867, by which they agreed to pay to the order of D. & Co., the defendants, \$1400 with interest in one year after date. When the note fell due interest at the rate of six per cent. was paid upon it and the note was allowed to lie over. On December 3rd, 1869, plaintiff paid another year's interest with two per cent. additional which defendants demanded for extending the time.

Held, that the additional charge so made was within the prohibition against taking more than legal interest contained in chapter 82, *Revised Statutes*, (2nd Series), and that defendants were liable to the penalties therein imposed.

DODD, J., now, (July 16th, 1872,) delivered the judgment of the Court :—

This was an action for penalties under chapter 82 of the *Revised Statutes*, (second series,) for taking more than legal interest. The first count of the declaration states that the

defendants on the 31st *December*, 1869, upon a certain corrupt agreement between the defendants, the plaintiff and one *George Patterson*, took, accepted and received from the plaintiff and the said *George Patterson* the sum of \$112, by way of corrupt bargain and contract for the defendants forbearing and giving day of payment of the sum of \$1400 due from the plaintiff and the said *George Patterson* to the said defendants, for one year from the 30th *November*, 1868 to 30th *November*, 1869, which said sum of \$112 exceeds the sum of \$6 for the forbearing of \$100 for a year, contrary to the form of the statute in such case made and provided. &c. The second count states the defendants on the 12th *March*, 1869, corruptly and usuriously demanded of the plaintiff and the said *George Patterson* the sum of \$1400 due upon a promissory note made by the plaintiff and the said *George Patterson* to the defendants, dated 30th *November*, 1867, together with one year's interest compounding to the sum of \$84, and the further sum of \$28 charged as commission at the rate of two per cent. upon the principal of said note, for the forbearance of one year, from the 30th *November*, 1868, to the 30th *November*, 1869, to the plaintiff and the said *George Patterson* the said sum of \$1400, amount of said note, &c. And that afterwards, in pursuance of such corrupt demand, the defendants over and above the legal interest of \$84 so due upon the said promissory note for one year's interest, demanded, took and received from the said plaintiff and the said *George Patterson* a further sum of \$28 for the forbearance of the said sum of \$1400 for one year, &c. The third count states the corrupt contract to have been made on the 3rd *December*, 1869, and the taking the \$28 over and above the legal interest of \$84 for the forbearance, as in previous counts, from 30th *November*, 1868, to 30th *November*, 1869. The fourth count in general terms states the usurious contract between the parties, the taking of the \$28 in excess of legal interest for the forbearance, and giving day of payment of \$1400 from 30th *November*, 1868 to 30th *November*, 1869, &c. Query, is not fourth count defective, not giving the time when usurious contract was made? The pleas are nothing more than a general denial, the first to the declaration, and then a plea to each count negating the allegations in those counts.

The cause was tried in 1871 at *Halifax* before Mr. Justice *Wilkins*, and a verdict found for the plaintiff. The learned Judge gave the defendant a rule that was argued in *January*, 1872, upon the grounds, first, misdirection of the learned Judge, and, secondly, that the verdict was against law and evidence. The counsel for the defendant contended that the declaration had been framed under Provincial Act, 10 *Geo. III.*, chap. 5, that had been repealed by chapter 82, *Revised Statutes*, 2nd series. That the repealing act had no reference to forbearing or giving day of payment, and was confined to contracts for the loan of money or goods. That the declaration was not supported by evidence showing a loan of money, but on the contrary the substituting of one security for another, that is giving up a mortgage for the note in question. It was further argued for the defendants that the contract was not an original one, that upon the failure in payment of the first note a second was given, and and upon that the usury is charged. The evidence is the reverse of that, the usury is charged upon the first note given in 1867, when the mortgages were released, and so stated in the declaration. The evidence in support of the plaintiff's case is very short and confined to certain papers produced by him as furnished by the defendants. It appears the plaintiff was largely indebted previous to 1867 to the defendants and the deceased *John Duffus*, the senior partner of the firm of *Duffus & Co.*, by mortgage of real estate to the said *John Duffus*, as collateral security for debts due the firm amounting to \$3700. That after the decease of the senior partner a settlement took place between the plaintiff and the defendants, when the mortgage security was released and the sum of \$687, part of the debt, given up to the plaintiff and a promissory note taken from him and his surety *George Patterson*, for the balance. The note is that referred to in the pleadings, and is as follows:—

“*HALIFAX, Nov. 30, 1867.*

“One year after date for value received we jointly and severally promise to pay *Duffus & Co.* or order fourteen hundred dollars with interest.”

It is important to observe that there is nothing in the note to show it is tainted with usury; it is payable with interest,

and we are bound to conclude legal interest, and so proved by the plaintiff. He says: "I paid on the note \$28 more than six per cent. interest. My brother took up the note; up to *December*, 1869, I paid two year's interest, and two per cent. additional. At the end of the year when the note became due (*November*, 1868,) I handed *Mr. James Duffus* a cheque for \$84; he said I must pay seven per cent. as the bank was charging that. I assented. The arrangement made with him at the time of giving the note was *to pay them legal interest*. I told him the bank rate had no application to my liability for interest in respect to the time that had passed. He said there is no use in multiplying words, you must pay seven per cent. or find the money. That seven per cent. I did pay as the receipt shows. The receipt is dated *December 3rd*, 1869, and is for extending \$1400 for one year, \$28, signed *Duffus & Co.* The second year I paid six per cent. and two per cent. additional, in all eight per cent. My agreement with the defendants was, if, after the note given, any change took place in the assessment law permitting a higher rate, I was to allow it, in the event of the note not being paid at the end of the year, and their granting an extension of time for payment. I knew the bank was getting seven per cent., and I got the extension. At the time of granting extension defendants charged seven per cent for the time that had passed, and it was paid. Another note was given by my brother to take up this note; he was my surety."

Such, then, is the evidence on the part of plaintiff, and it stands uncontradicted, as no evidence was produced for the the defendants. At the close of the plaintiff's case a non-suit was moved for on the ground that the excess of interest was not taken on a loan. The Judge declined to non suit and the jury found as I have already stated.

The first point taken at the argument by the counsel for the defendants was that this was not a loan of money, and the excess of interest taken by the defendants did not make them liable under chapter 82 of the *Revised Statutes*,—that the act had no relation to a forbearance or giving time as stated in the declaration. Upon reference to the act it will be found that it enacts that no person upon any contract shall take directly or *indirectly* for the loan of moneys or goods

above the rate of six per cent. per annum, and all contracts whereby a greater rate of interest is reserved shall be void, and all persons taking or receiving upon any contract or security a greater rate shall forfeit treble the value of the moneys or goods in such contract or security contracted for or secured. The law is confined to the first section of the act, but the section includes three distinct parts of the same subject, and the cases cited for the defendants more particularly refers to the first part of the section. That no person upon any contract shall take directly or indirectly for the loan of moneys or goods above the rate of six per cent. per annum. The case of *Floyer v. Edwards*, Cowper, 112, cited for defendants, was an action for goods sold, &c. The defence was usury, but as the sale was *bona fide* it was held not to be usurious. Lord *Mansfield* said: "The statute 12 *Anne*, chap. 16, prohibits anybody from taking on the loan of money above five per cent., and all contracts for any loan of money, &c., bearing interest above five per cent., with an agreement for principal and interest are null and void. But with regard to principal and interest in case the agreement originally for the payment of principal be legal, and the interest does not exceed the legal rate, but afterwards on payment being forborne, illegal interest is demanded, then the agreement by retrospect is not void, but the parties are liable to the penalty of treble value." This case is precisely in point with the one we are considering. Here the note from the plaintiff and his brother to the defendants was for a legal debt, and the interest not beyond what the law allows, therefore not void, but upon payment of the note being forborne, the taking of the illegal interest by the defendants made them liable to the penalty. His Lordship further said if the substance is a loan of money, nothing will protect the taking of more than five per cent., and though the statute mentions only "for loan of moneys, &c.," yet any other contrivance if the substance, if it be a loan, will come under the word *indirectly*. Therefore in all questions, in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction; the view of the parties must be ascertained to satisfy the Court that there is a loan and borrowing, and that the substance was to borrow on the one part

and to lend on the other, and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. *Ferrall v. Shaen*, 1 Saunders, 294. A bond good when made is not void by a subsequent usurious contract, but the obligee is therefore subject to the penalty by the latter clause of the statute 12 Car. II., chap. 13. This statute and 12 Anne, chap. 16, are the same in their provisions, with the exception of the reduction of interest from six per cent. to five. In *Sir T. Raymond*, 196, *Rex v. Allan, Troyeden, J.*, took a difference upon the two clauses in the statute of 12 Car. II., sec. 13, which is confirmed by all the authorities ancient and modern, that if the lender contracts for greater interest than the statute allows, so that the agreement is corrupt at the time of the loan, all the assurances are void; but if he contracts for no more than the statute allows, but might afterwards, that is upon a subsequent agreement take more, the assurances are not void, but the party shall forfeit treble the value; 1 Mod., 69; 1 Vent., 38; and herewith agree the following cases: 1 Cooper, 114; *Fisher v. Beaseley*, 3 Wilson, 261; *Lloyd v. Williams*, 2 Black, 792; 3 T. R., 538, 9; 2 Mod., 307. In order to constitute usury within the meaning of 12 Anne, so as not only to make the assurance void, but also to subject the party to the penalty, there must be both an usurious contract at the time of the loan, and an usurious taking in pursuance of it of money or of money's worth. *Scott v. Brest*, 2 T. R., 241. A man may subject himself to the penalty of the statute, and let the assurances be legal. On the other hand the assurances may be usurious, may be void by the statute, and yet the party may not be subject to the penalty of it, for if a man contracts for more interest than the statute allows, and afterwards takes no more than legal interest, the contract is void, but the lender will not be subject to the penalty. *Fisher v. Beasley*, Douglas, 236, hence it follows, and it has so been decided, that the penalty is not incurred until more than legal interest is actually received. Note 1 to *Ferrall v. Shaen*. The evidence in the present case under the hands of the defendants shows that more than legal interest was received by them for giving time for one year to the plaintiff on his note, that is from November 30th, 1868, to November 30th, 1869, as appears

by their receipt of *December 3rd*, 1869, and when so received, then, and not until then, they became liable to the penalty. Lord Commissioner *Eyre* in *Spurrier v. Mayoas*, 1 Ves., 531, defines usury to be taking more money than the law allows upon a loan, or for forbearance of a debt. If this definition of the Lord Commissioner is correct, then the defence fails, for here there was forbearance of a debt, and for that forbearance more than legal interest was received by the defendants. The one per cent above legal interest here taken by the defendants, does not come within the cases where country banks are permitted to take it in the way of commission for their trouble and expense in discounting bills and transmitting moneys. *Brooke v. Middleton*, 1 Camp., 445; *Hammett et al. v. Yea*, 1 B. & P., 144; *Auriol v. Thomas*, 2 T. R., 52. In *Wade v. Wilson*, 1 East., 195, one of the questions raised was, "Was the transaction a loan of money so as to bring it within the statute of 12 Anne?" There one *Goulton*, being indebted to one *Flintoft* £600 on bond, and *Flintoft & Son* being indebted to defendant in £1200 on promissory note, but not being able to pay more than half the debt, it was agreed that the defendant should assist *Goulton*, and another person by way of surety of the name of *Yates*, for the remaining £600, instead of *Flintoft*, the defendant saying he would only lend *Goulton* the money for one year; accordingly *Goulton* and *Yates* gave their promissory note to the defendant for £600 on demand, with interest at the rate of five per cent.; at the same time the defendant received from *Goulton* ten guineas by way of premium, and afterwards legal interest £15 at the end of six months, and £15 at the end of the year. The eighth count, upon which the verdict was taken, stated the £600 to be a loan of money from defendant to *Goulton*. It was objected at the trial that the case proved did not apply to the count, that there was no loan of money as stated, none having been paid or received by *Goulton*, and that the making himself a debtor instead of *Flintoft*, and giving his own note for the money did not constitute a loan. The learned Judge, however, was of opinion that the loan to *Goulton* was sufficiently proved, and the plaintiff had a verdict. The ruling of the Judge upon argument before the Court was upheld. Lord *Kenyon*, C. J., said there was no weight in the objection, that

it was in substance a loan of money from defendant to *Goulton*, although the ceremony of handing the money from one to another did not take place, but the loan originally advanced to *Flintoft* was by agreement transferred to *Goulton*. This case in many respects is similar to that under consideration,—here a debt was due to the late firm of *Duffus & Co.*, when, after the death of the senior partner, the plaintiff found himself unable to pay it, and the present defendants assuming the debt and releasing the plaintiff from his securities to the old firm, took the promissory note in question from him and his surety *George Patterson*. No money passed between plaintiff and defendants at the agreement between them because the transaction did not make it necessary. Nevertheless in substance it was a loan of money, as much so as in the case of *Wade v. Wilson and Manners v. Postan*, 3 B. & P., 343. There the plaintiff being indebted to one *Dance* in the sum of £111 10s. gave a warrant of attorney to secure that sum, and *Richard Lowe* also gave his note for the same sum as a collateral security; the note was endorsed by *Dance* to the defendant, who took more than legal interest upon the note from *Lowe*. A verdict was found for the plaintiff, and upon argument it was contended that no money was ever lent by *Postan* to *Lowe* as averred in the declaration, for that the usurious interest was taken for the forbearance of £50 due upon a promissory note which *Lowe* had given as a collateral security for the debt of a third party, which could not constitute a loan from the defendant to *Lowe*. But the Court thought the transaction equivalent to a loan of money, and referred to *Wade v. Wilson*, 1 East., 195. In *Lowe v. Waller*, 2 Doug., 739, action on bill of exchange, defence usury, Lord *Mansfield* said the only question in cases like the present is, what is the real substance of the transaction, not what is the colour and form, and His Lordship in substance says the same thing in *Richards v. Brown*, Cowper, 770; there he says: "The substance of the transaction and the true intent and meaning of the parties alone are to govern, and not the words used. If the statute was intended to apply to cases where in fact there was a loan of money, and to none other, it would not remedy the evil it was intended to supply." Suppose in this case the note had been given for work and labor performed

by the defendants for the plaintiff, and when it became due the plaintiff was unable to take it up, and an extension of time was given to him by the defendants upon his paying them one per cent. over legal interest. Here there would be no actual loan of money, that is no money passed from hand to hand between the parties; yet in substance, according to the authorities I have referred to, it would be equivalent to a loan of money, and the defendants would be liable to the penalty.

Upon the objection to the verdict as against law and evidence, I think the defendants have failed, but upon the second point, misdirection, I have had some difficulty before I could come to the conclusion that the case should not go to a second jury, upon the question of fact as to the true intent and meaning of the parties as respects the contract, but upon the whole I consider the evidence conclusive upon the point, and that the jury could not find otherwise than as they have. I therefore think the rule for a new trial should be discharged with costs.

I have not referred to the Provincial Act, 10 *Geo. III.*, chap. 5, notwithstanding the observations of the learned Judge who tried the cause, and the reference to it at the argument by the counsel for the defendants. The act was repealed by chapter 170, *Revised Statutes*, 1st series, section 9. *Broom's Maxims*, page 21, says it has long been established that when an act of punishment has been repealed it must be considered (except as to transactions past and closed) as if it never had existed, consequently it can have no application or bearing upon the case under consideration.

Chapter 82 is silent as to the manner in which the action is to be brought for the penalty. But chapter 1, section 8, of the *Revised Statutes*, provides that where a penalty shall be imposed, and no particular mode prescribed for the recovery thereof, the same may be recovered in the name of any person that shall sue therefor, in the same manner and with the like notice as if it was a private debt due such person, the nature of the offence being briefly stated in the summons; and where no particular mode of applying any penalty shall be prescribed, the same shall be paid, one-half to the person who shall have

sued therefor, and the other half to the Overseers of the Poor for the place where the offence was committed for the use of the poor thereof.

YOUNG, C. J.—This is the first instance of a prosecution for penalties under the usury laws of this Province, and while the preparation of the judgment was assigned to Mr. Justice *Dodd*, who has just delivered it, we have all of us looked carefully into the case, and on account both of its importance and its novelty, I think it right to add a few observations. The law on this subject has come several times of late before this Court, and in the case of *Barss v. Strong*, in Trinity Term, 1869, I delivered a judgment (1 Nova Scotia Decisions. 450) in which I traced it to its origin.

The law of this Province is contained in the first section of chapter 82, *Revised Statutes*, second series, reprinted in the third series, fol. 741, which was derived from the old Province law of 1770, to be found in the first volume, fol. 160. It is almost a transcript from the old *English* statute, 12 *Anne*, chapter 16, which was founded along with the statute of *Charles II.* on the 21 *James I.*, and this statute contained substantially the same provisions as the two statutes of *Elizabeth* and *Henry VIII.* This epitome I take from *Lloyd v. Williams*, 3 Wils., 250, 2 Bl. Reps., 792, and from *Pyles on Bills*, edition of 1866, fol. 300, who observes that all the cases on usury since 13 *Elizabeth* were applicable to the law as it stood in the mother country before the entire abolition of the usury laws by the 17 & 18 *Victoria*, chapter 90, in the year 1854.

Our law, then, is at utter variance with the law of *England* as it has been gradually modified for the last thirty-five and has existed for the last fifteen years. It is at variance with that of *Canada*, where the usury laws have also been repealed, and with the laws of the adjoining Provinces, and presents a strange anomaly and inconsistency with itself. A further anomaly arises out of the *Dominion Act*, 3 *Victoria*, chap. 11, sec. 17, exempting the banks from any penalty or forfeiture for usury, and permitting them to exact seven per cent. when the mercantile community can only take six. Our interest and usury laws in short in the *Dominion* are in

a very confused and imperfect state, and require an act of wise and comprehensive legislation, which I regret to find it has hitherto been found impossible to carry. In the meanwhile we are bound to decide the cases that may come before us on the law as it is, going back to the ancient cases which have little application to modern times, and acting upon principles, the wisdom of which may often appear to us more than questionable.

For these and other sufficient reasons I am by no means disposed to favor defences or prosecutions under the Usury law, and I do not hesitate to avow that is with reluctance that I find myself compelled to sustain the verdict in this case. The facts lie in a nutshell and are not at all disputed. A note is drawn *November 30th, 1867*, payable in one year with interest. Six per cent interest is paid upon it *November 30th, 1868*, as endorsed, and the note is suffered to lie over. On *November 12th, 1869*, payment is demanded of the principal sum \$1400, with \$84 for a year's interest due *November 30th*, and two per cent. commission for extending it. The interest is paid *December 3rd, 1869*, and \$28 more, being as expressed in the defendant's receipt, "2% extending \$1400 one year, \$28." On *December 21st, 1867*, a few days after the date of the note, the *Dominion* act was assented to, enabling the banks to reserve or exact seven per cent., and we may fairly assume from what appears on the Judge's notes, and from circumstances that have fallen under our own observation, that the two per cent. in this case was intended to represent the difference between mercantile and bank interest, and was not considered by the defendants, whatever it may have been accounted by the plaintiff, as either usurious or oppressive. Still I have no doubt it was against the law. Our old act of 1770, founded on the *English* act of 12 *Anne*, chapter 16, and in its very words declares, "That no person or persons whatsoever, upon any contract which shall be made, shall take directly or indirectly for loan of any moneys, wares, merchandize, or other commodities whatsoever, above six pounds for the forbearance of one hundred pounds for a year," and so forth. The *Revised Statutes* declare that "no person upon any contract shall take, directly or indirectly, for the loan of moneys or goods above the rate of six per cent. per annum,"—

the rate of six per cent. for what? for the forbearance or giving of time for a year of £100. If it does not mean that it means nothing. But construing the revised by the original statute, and looking to its intent and object, there can be no doubt of the meaning. Besides the revised statute goes on to enact that "all contracts whereby a greater rate of interest is reserved, that is, a greater rate than six pounds for the forbearance £100 for a year, shall be void; and all persons taking or receiving upon any contract or security a greater rate shall forfeit treble the value of the moneys or goods in such contract or security contracted for or secured," being the same forfeiture imposed by the *English* acts already referred to, from the 37 *Henry VIII.*, chap. 9, to the 12 *Anne*, chap. 16.

Nothing was said at the trial of this cause nor at the argument upon the several counts in the writ. I have some doubt whether, under the 54th section of our *Practice Act*, chap. 134, and the 8th section of chapter 1, the *English* doctrines apply. But supposing they do, and that under the cases, 2 *Ad. & El.*, 670; 4 *New. & Man.*, 532; 1 *Car. & Payne*, 534, &c., exception could be taken to some of the counts, the third seems unassailable, and under the practice in *Archbold*, 463, and the cases there cited, the plaintiff may move the Court, if he think fit, to enter the verdict and judgment upon such of the counts as may appear upon inquiry to be good.

For these reasons I think the plaintiff entitled to our judgment.

JOHNSTONE, E. J.—The act for which the defendants are sought to be charged with heavy penalties was insignificant as to its amount, and in its nature, in view of the course authorized and adopted by the banks, it was free from the imputation of injustice or oppression, and it appears from the evidence that the defendants had previously extended to the plaintiff a very generous consideration in the remission of a considerable part of the large debt due to them. We may, and indeed can hardly fail to regret that an action apparently so harsh and ungenerous should be brought, but our province is to administer the law, and I reluctantly concur in the opinion that the rule to set aside the verdict must be discharged.

McPHEE v. VICTORIA COAL MINING CO.

PLAINTIFF brought an action against defendants to recover an amount alleged to be due him for sleepers sold and delivered by him to them. A verdict was found in his favor, but there was no evidence of any agreement on the part of plaintiff to sell to defendants, or of the latter to purchase, or of any delivery of goods to defendants by plaintiff for and on his own account. The verdict was accordingly set aside.

DESBARRES, J., now, (July 16th, 1872.) delivered the judgment of the Court:—

This was an action brought to recover from the defendants \$245.30, which the plaintiff by his writ and bill of particulars claimed to be due to him for goods (1000 railway sleepers or ties) sold and delivered by him to the defendants. The defendants pleaded that they were never indebted to the plaintiff, and at the trial had at *Sydney, C. B.*, in *June* term, 1871, the jury found a verdict for the plaintiff for the full amount of his claim. A rule *nisi* was granted to set the verdict aside on the ground of its being against law and evidence and the charge of the Judge. The case was argued before the Court at the last *January* term and judgment reserved, not because of any difficulty which the case itself presented, but to give the parties really interested in it an opportunity of making any arrangement to prevent, what seemed very probable, further litigation on the subject. No arrangement having been made it now remains for the Court to dispose of this case. Having carefully considered the evidence, we are of opinion that the action was misconceived and will not lie against the defendants, in the name of and at the suit of the plaintiff, there being no evidence of any agreement, express or implied, at any time made by or on the part of the plaintiff to sell, and none by or on the part of the defendants to purchase the goods for the price of which this suit was brought, and no proof that the goods were ever delivered by plaintiff to the defendants for and on his own account. The plaintiff at the very beginning of his examination admits that *Hugh Ross* came to him in 1870 and informed him that he had engaged to get 3000 sleepers for the Company for which he offered 4s. per dozen. That he at the time hesitated in making an engagement with *Ross* to supply the sleepers, fearing he could not get them for the price

offered. That having made inquiry he wrote to *Ross*, stating that the sleepers could not be had at the price offered, and on receiving from him the letter of the 4th *February*, produced in evidence, offering 5s. per dozen he made his arrangements to procure, and agreed to supply *Ross* with the sleepers, and afterwards bargained with Captain *McInnis* to convey them in his vessel from the places of shipment to the *South Bar* of *Sydney* harbor, to be there delivered to the defendants. Captain *McInnis*, the next witness, states that he conveyed three loads of sleepers for the plaintiff on his vessel, which he delivered to the defendants, and received from the plaintiff \$70 on account of his freight, and a further sum of \$20 from defendants, under the order of *Hugh Ross* on same account, thus showing that the contract for the supply of the sleepers was made by the plaintiff with *Hugh Ross*, and not with the defendants, who are consequently responsible to *Ross* and to him alone for the price.

If there can be any doubt upon the subject arising out of the evidence for the plaintiff, that doubt must be entirely removed on referring to the evidence adduced on the defence, to which I will briefly refer. *John Lawson*, the manager of defendant Company, and the first witness called on their part, says he entered into a contract with the Rev. *Hugh Ross* for sleepers for the use of defendants, dated 24th *January*, 1870, whereby he agreed to deliver 3000 spruce and juniper sleepers of the dimensions therein specified, at the *South Bar* landing, on or before the 12th *May*, then next, at fourteen cents each. That he entered into no contract with the plaintiff, and that *Ross's* son, in the absence of and acting as agent of his father, who was in *England*, delivered the sleepers to him, partly at the *South Bar* and at other places, according to arrangements made between them. That plaintiff applied to him for money, and with the consent of *Walter Ross*, the son of *Hugh Ross*, he paid him \$80, telling him at the time that he ought to have had an order from *Ross* for it. That on being applied to for money a second time, he again told him the plaintiff ought to have had an order from *Ross*, he being the person he had to deal with, and not him; that having no money on hand he requested a person named *Fraser*, who was present, to let the plaintiff have \$55 to oblige him, which he

did. That he subsequently paid *Fraser* this sum so advanced to the plaintiff under the instructions of *Walter Ross* the son who afterwards told him not to pay plaintiff any more money. The Rev. *Hugh Ross*, the person really responsible, for the price of the sleepers, was the next witness called on the defence. He admitted having entered into the contract of the 24th *January* with defendants to supply sleepers, and that after entering into the contract he had a conversation with plaintiff, and told him he had taken a contract from *Lawson*, the manager of the Company, and asked him if he would get the sleepers. That plaintiff told him he was not sure, but would go and try if he could get them. That the sleepers were not delivered to him personally, but he understood the plaintiff had delivered them to the Company in his name. That he had authorized Captain *McInnis* by an order of 13th *August*, 1870, to get \$20 from the Company, but could not say that he had ever instructed *Lawson* the manager, or *Sutton* the cashier of the Company to pay any money to the plaintiff. *Joseph Sutton*, the cashier of the Company, says he made several payments on a contract which he believed to have been made between *Lawson* the manager and *Ross*, and that the account of the sleepers, &c., was kept with *Hugh Ross*. *Walter Ross*, the son of Rev. *Hugh Ross*, states that the sleepers were delivered by him to the defendants for his father, which the plaintiff had got from different persons for his father. That he was acting for and under his father's authority with regard to the sleepers, and while so acting authorized *Lawson* the manager of the Company to pay money to the plaintiff, and that he as such agent had himself received money on account of the sleepers.

Taking the whole of the evidence together, and considering it with every disposition to sustain the verdict, if any evidence can be found on which it can be upheld, we think it must be set aside, and that the plaintiff's only remedy is against the Rev. *Hugh Ross*, with whom he contracted, and on whose account he agreed to deliver, and did deliver, to the defendants the quantity of sleepers charged in the particulars of his claim, which the jury have found to be justly due, and ought, as we think, long since to have been paid. The rule must therefore be made absolute with costs.

PETERS v. FRECKER.

DEFENDANT built a stone wall between his land and that of the plaintiff, of which three feet at the bottom and one foot nine inches at the top were on plaintiff's property. At the time the wall was erected plaintiff said to defendant's builder: "You're building on my land;" he said, further, that he had no objection, but "I caution you that in the case of my selling the purchaser may put you to trouble."

Held, that this was qualified licence justifying the erection of the wall but going no further.

JOHNSTONE, E. J., now, July 16th, 1872.) delivered the judgment of the Court as follows:—

The plaintiff and defendant owned lots near *Freshwater* adjoining each other, that of the plaintiff lying on the shore of the harbour between the defendant's lot and the sea. The trespass complained of is a wall erected by the defendant in the rear of his lot, the foundation of which is laid about three feet on the plaintiff's land, butting or inclining towards the defendant's property. Had the wall been continued on the same inclination about fifteen inches more it would have reached the true line between the properties of the plaintiff and defendant. Instead of this its top presents a flat surface on which a wooden fence is erected on that line, leaving about one-fourth of the wall at the top on the plaintiff's land as well as the wooden fence, the encroachment being the part of the wall about eleven feet high, built on both properties, of which three feet at the bottom, and about one foot or nine inches on the top, are on the plaintiff's property.

The pleas are denial,—licence simply,—licence and the expenditure of money on the work on the faith of the licenses—a licence that part of the wall should be placed on plaintiff's land, and expenditure of money on the faith of the licence. There is a plea on equitable grounds, alleging the wall to be on the division line, and the erection and expenditure to have been with the knowledge and consent of the plaintiff. The pleas of licence were true, except the last, wherein it asserts the wall to have been put on the line, but they do not convey the whole truth. There was a licence, but it was qualified. This is undeniably established, being proved by the defendant's own builder, who sets up the licence, *John Marven*. He says: "I acted for defendant in building the wall; I conversed

with plaintiff; he said, 'You're building on my land;' he said he had no objection, but in the event of selling, the purchaser might object; 'I caution you in case of my selling that the purchaser may put you to trouble;' what occurred between *Hesslein* and *Tupper* was mentioned as illustrating what might happen; I think I said if you'll give us permission I'll run the risk." In cross-examination the witness added: "I might have said as part of the conversation that the wall if erected could be taken down." There was an attempt to prove revocation, which I think failed. A verdict was given for the defendant under the direction of the learned Judge.

The verdict is right as far as the presentation is concerned because the licence, qualified as it was, justified the erection of the wall, but the licence goes no further; and as far as any of the pleas could be construed into a licence that either at law or in equity would justify a claim for a permanent and indefeasible lien, they would lead to a conclusion not warranted by the evidence. But the pleas as they stand are pertinent to the present case, and we must treat the verdict as giving effect to them only as far as they apply to the present case. If they seem to go farther we have no means or authority to consider them in that aspect, or in any other, than which limits them to this particular action. The rule *nisi* for a new trial must be discharged and judgment entered for the defendant on the second, third and fifth pleas of licence.

The evidence given for him, which we must consider the jury to have adopted, established a licence that covered the plaintiff's complaint, "that the defendant built on his close a stone wall and fence that encumbered the close and prevented plaintiff's enjoyment of it." Should any controversy arise hereafter in respect of a claim made by defendant or any claiming under him to continue the encumbrance, that will have to be determined by the nature and extent of the licence proved by the defendant.

In order to perpetuate as far as possible that evidence, we direct that the original minutes of the Judge who tried this cause, and this decision, be filed together with the record. The defendant is to have the costs of the argument.

ROSS ET AL. v. MCKENZIE.

WHERE a conventional line is established it concludes the parties to it.

WILKINS, J., now, (August 5th, 1872,) delivered the judgment of the Court:—

We have considered this case since the argument and have seen no reason to change the opinions we intimated at the close of it.

A conventional line which, if established, concluded the question, was proved by evidence of the most satisfactory character. If any doubt or contention between the parties affected by it was raised after it was previously adjusted, it was re-established and confirmed by the arbitration and its result. The amendment asked for by *Mr. Oldright* and refused by the Judge, if allowed, would not have made the position of the defendant more favorable to him than it was under the evidence received. The whole matter of the equitable plea was fully considered and decided by the jury against the defendant. One of the contentions made by his counsel at the argument was that there was a question of possession which was not and should have been put to the jury. We are unable to discover anything in the evidence to raise that question, nor is it reported that the Judge at the trial was asked to submit it if there had been any ground for it. As to the subordinate points of: 1st, no proof of guardianship, and 2nd, that the plaintiffs are tenants in common, and that there is proof of other tenants not joined. The first of these is an objection too clearly untenable for argument. As to the second, the case from 1 *Exchequer* gives no support to it, for the only proof on the point given by the witness *McLean* is, "Old *McLean* had eight children I have been told, three only have I seen." The necessary facts to give application to the authority cited are wanting. The rule must be discharged with costs.

CARR v. CAREY ET AL.

DEFENDANT accepted a bill of sale and received delivery of a horse, cart and harness from McC. to secure advances made, on the faith of representations by both plaintiff and McC. that the property was that of McC. and that plaintiff had no claim to it.

Held, that defendant had a right to retain the property, at all events until he was paid.

YOUNG, C. J., now, (August 5th, 1872,) delivered the judgment of the Court:—

I am of opinion that the verdict for the defendants in this case should be upheld. The bill of sale, ante-dated *August 12th*, left at the Registry *October 11th*, but not executed by Carr, if executed at all, till *October 12th*, 1869, was properly rejected by the Judge. The mare, &c., being in the possession of *McCormick*, dealing with them as his own, we have to look to the parol evidence for the terms on which he held them. The plaintiff says they were a gift upon conditions. *McCormick*, who was his son-in-law, was to have the mare as long as he behaved himself. He had authority to do what he liked with the property while he took care of it; he got it to make his living. *Day* confirms this. *McCormick* was not to sell, swap or give away. He was to have the property as long as he conducted himself in a proper way. Witness told *McCormick* by plaintiff's directions to take care of himself and keep sober, or he would take the horse away from him. Were this evidence uncontradicted, there might be a case for the plaintiff, though of a vague and suspicious sort, but it is contradicted, and in the most effective way, by the plaintiff himself. *McCormick's* evidence I put out of the case altogether; he is utterly unworthy of credit, having deceived and lied to both parties. The plaintiff on his cross-examination says: "I stated at the Police Office that I had no call to the mare, truck or harness, that I had given the mare to *McCormick* to make his living. I had at that time no claim to the mare. I stated that the mare, truck and harness were *McCormick's*." *Carey* says: "I was at the City Court when *McCormick* and Carr were examined; Carr was asked who was the owner of the horse, cart and harness; he said they were the property of *McCormick* and he had no claim to them." And again: "I took the bill of sale on the oath of *McCormick* and Carr before the City

Court, that the property belonged to *McCormick*." The other witnesses concur in this, and *Carey* having accepted a bill of sale from *McCormick*, and made advances to him on the faith of these representations, his bill of sale having been duly lodged at the Registry, and the property in his possession by delivery from *McCormick*, I think he had a right to retain it, at all events till he was paid, and, the facts having been fairly left to the jury, that their verdict should not be disturbed.

O'CONNOR v. WEEKS.

An assignment of a debt under chapter 124 *Revised Statutes* (3rd Series) sections 63 and 65 may be made by parol as well as by deed.

Such an assignment is not bad because of a resulting trust in favor of the assignor, or if made for the indemnity of the assignee without an actual advance.

Where the Act required notice of an assignment to be "served on the party to be sued or left at his last place of abode."

Held, where the debtor was an attorney, that a notice served upon him by leaving it at his office instead of, in the words of the Act, "at his last place of abode" was within the spirit of the Act.

YOUNG, C. J., now, (August 5th, 1872), delivered judgment as follows:—

This action was tried in *October* last, at *Halifax*, before Mr. Justice *Wilkins*, who instructed the jury, after answering certain questions submitted to them, to find for the plaintiff, which they did, in the sum of £120.

Thomas Webb, having been arrested on a criminal charge, and a sum of \$150 belonging to him being in defendant's hands, applied to the plaintiff to become his bail, which he agreed to do on receiving an indemnity. *Webb* thereupon made the following assignment to the plaintiff:—

Halifax, 7th October, 1870.

For value received, I hereby assign, transfer and set over unto Jeremiah O'Connor, his executors, administrators and assigns, all moneys belonging to me or to which I have or shall have any right or claim, in the possession of *Joseph H. Weeks, Esquire*.

(Sgd.) THOMAS WEBB. (L. S.)

Witness:

(Sgd.) JOSEPH COOMBES.

And on the same day the following notice was served at defendant's office:—

Halifax, October 7th, 1870.

DEAR SIR,—Please take notice that *Thomas Webb* has this day duly assigned to me all moneys in your hands belonging to *Mr. Webb*. I shall be happy to shew you the assignment at any time.

Yours, &c.,

(Sgd.)

JEREMIAH O'CONNOR.

J. H. WEEKS, ESQ.

Plaintiff thereupon engaged *Mr. Coombes*, in the absence of defendant, who had gone to *New Brunswick*, to defend *Webb*, who was sometime after tried and acquitted, and the bail consequently discharged. The defendant having done other business for *Webb* just before he left for *New Brunswick*, gave him a receipt which, as *Webb* contended, was a full discharge according to its terms. After the acquittal plaintiff and *Webb* went together to make a settlement with defendant, who had seen the assignment, and offered him their joint receipt, which he would not accept; and this action was brought by the plaintiff, the expense and liability of employing counsel, and some recompense being his own claim, and the balance to be handed over to *Webb*.

Under these circumstance one would think there would be little need for an action. It is admitted that defendant received the \$150. His account against *Webb* for services might have been at once rendered and adjusted, and the balance paid to *O'Connor* and *Webb* on the joint receipt that was tendered. In place of this simple and easy adjustment, our attention was invited at the argument to the right of the plaintiff to sue as assignee under the *Equity Act*, sections 63 and 65, and to the effect of the questions submitted to and answered by the jury. The above and kindred sections of chapter 124, *Revised Statutes*, only import into the common law side of this court certain equity doctrines which it was thought convenient to bring here, and which are to receive a liberal construction, so as not to defeat the end they are obviously intended to serve. It was a point made at the trial that the assignment when executed, had no seal to it. The

jury, as we have seen, found that it had, but it is a matter of perfect indifference whether it had or not. In Equity, and equally as I take it at common law in construing this chapter, an assignment of a debt may be made by parol as well as by deed; *Story's Equity Jurisprudence*, sec. 1047, citing *Heath v. Hall*, 4 Taunt., 326. Then it was said that an assignment was bad, if there was a resulting trust for the assignor. Or if it was made for the indemnity of the assignee without an actual advance, or if the notice to the debtor did not state the right of the assignee, as required by the 65th section, and specify his demand thereunder. We find no such limitations in Equity, and it is difficult to find any reasons for them. Why should not a creditor to whom £100 is due assign that amount to another to whom he owes £50, first of all to pay himself and then to account for and pay the balance to the assignor. Or if the creditor desires another to become his surety or his bail, why should he not assign that £100 as an indemnity. The notice in this case declared that all of *Webb's* money in defendant's hands—that is, *Webb's* entire interest in the chose in action—had been assigned to the plaintiff, and the appropriation or disposition of the money as between the plaintiff and *Webb* was a matter with which the defendant had nothing in the world to do. The object of the notice, as in Equity, was to prevent the debtor from paying over the money to the assignor, who cannot revoke his appropriation after the assignee has acquired an interest or incurred a liability. "The assignment of a debt, says *Story*, sec. 1057, does not, in Equity, require the assent even in any manner, of the debtor thereto; though to make it effectual for all purposes, it may be important to give notice of the assignment to him, since until notice, he is not affected with the trust created thereby, and the rights of third persons may intervene to the prejudice of the assignee."

I have looked at the leading cases establishing these principles, which are well settled, and so far as the case of *Ward v. McDonald*, Thomson's Reps., 422, may be supposed to be in conflict with them, I cannot assent to it. It is to be noticed, however, that it is distinguishable from the present, as the assignment on the face of it conveyed *Webb's* entire interest to the plaintiff, and the entire interest might have

been required to cover the plaintiff's liability had *Webb* been convicted. *Webb* was not worthy, it would seem, of the confidence of either party. He repudiated plaintiff's right to the defendant, and then authorized or concurred in the action and made an affidavit to aid in setting aside defendant's pleas. Had he been at the trial he might possibly have been obliged to confess a further liability to the defendant, and the jury, in all probability, and this Court, would willingly have protected him. It is possible that the receipt of 1st *October*, 1870, should have a limited operation. As it stands, the jury have held it conclusive—they have allowed the defendant \$'0 for services and money paid, and we do not see on what principle it is possible for us to disturb the verdict.

DODD, J.—This cause came before the Court under a rule taken under the statute to set aside a verdict for the plaintiff. The cause was tried before Mr. Justice *Wilkins* at the sitting at *Halifax* in *October*, 1871. The action was to recover a sum of money due by the defendant to *Thomas Webb*, and by him assigned to the plaintiff by an assignment duly executed under seal dated 7th *October*, 1870, as follows: "For value received I hereby assign, transfer, and set over unto *Jeremiah O'Connor*, his executors, administrators and assigns, all moneys belonging to me, or to which I have or shall have any right or claim in the possession of *Joseph Weeks, Esq.*" Of this assignment a notice was given to *Mr. Weeks*, by leaving it at his office on the day it bears date, the 7th *October*, and this the jury have found, it having been distinctly put to them in the shape of a question by the learned Judge who tried the cause. The jury also found that the seal was attached to the assignment at its execution, and upon that day there was nothing due by *Webb* to the defendant for professional services, and a general verdict for the defendant for the plaintiff for \$120.

The jury by their finding, so far as the facts of the case are important to the plaintiff retaining his verdict, have settled it, provided the evidence in the cause justified such finding. The rule for the new trial is general, and allows the defendant to take any objections, either of law or fact, against the verdict. The first objection taken at the argument was that there was difference between the assignment and the

record, but as that objection was not taken at the trial, it cannot prevail now. If taken at the trial, and there was anything in it, the Judge on application would have ordered an amendment. Secondly, that the mode of assignment under the statute was insufficient. Upon turning to the statute it will be found that no precise words are required. The sixty-fifth section of the act requires a notice in writing signed by the assignee or his agent or attorney, stating the right of the assignee and specifying his demand thereunder, and to be served on the party to be sued, or left at his last place of abode, at least fourteen days before the commencement of the action.

The action here was commenced on the 15th *November*, and the notice of assignment left at the office of the defendant, who is an attorney of this Court, on the 7th *October*, much beyond the fourteen days required by the act. The notice in itself states the right, and specifies the demand of the assignee. The language of the notice is: "Please take notice that *Thomas Webb* has this day duly assigned to me all moneys in your hands belonging to *Mrs. Webb*. I shall be happy to show you the assignment at any time;" signed by the assignee. The demand of the plaintiff is all the moneys in the hands of the defendant belonging to *Webb*, and his right to recover them is the assignment referred to in the notice. I therefore think the notice given adequate and in compliance with the requirements of the 65th section of the act.

Third objection; service of notice at the office of the defendant was not what the act requires. It must be either personal or at his last place of abode. Although this mode is prescribed by the act, it appears reasonable that if it is effected in any other manner so as to bring it to the knowledge of the defendant, the statute is substantially satisfied. An attorney's office is as likely a place for a notice left there coming to his hands as if left at his place of abode. The defendant shows that the notice never came to his hands and that he never heard of it, until an affidavit was made in Court on the 17th *January*, 1871. It is proved, however, that the notice was left at his office. He says he was away on the 7th or 8th *October*; was obliged to go to *New Brunswick*; was absent a week; that about a day or two after he got home *O'Connor*

came to his office with the assignment and showed it to him; said he wanted that money of *Webb's*; took out of his pocket a paper that had no seal to it; he, the defendant, received it, and said most decidedly, "I do not intend to pay it." This could not be later than the 20th *October*, and then he became acquainted with the fact of the assignment and repudiated it, not upon the ground that he had not received a previous notice, which as a lawyer he must have known, and could not be compelled to pay the money until he had received it.

After much consideration we have come to the conclusion that the notice served upon an attorney at his office instead of service in the words of the act, at his last place of abode, is within the spirit of the act. After so determining there is very little more to decide. The question of misdirection on the part of the learned Judge, in drawing the attention of the jury to the fact of the knowledge of the defendant of the assignment, and his having served it in his office, becomes unimportant now that we have concluded that the notice left at the office was sufficient. Admitting it was a misdirection, which I am not prepared to admit, as it was part of the evidence in the cause, coming from defendant himself, and having from the manner it was referred to by the learned Judge no further bearing than that the defendant had knowledge of the assignment, but not that he had notice of the assignment as directed by the statute. The defendant has admitted the receipt of money from *Webb*, amounting to \$150, and that there was a balance of that amount still due to *Webb* at the date of the assignment. The whole case was before the jury, and they herein reduced the sum of \$150 placed in the hands of the defendant by *Webb* for such charges as he proved himself entitled to for services performed by him for *Webb* previous to notice of assignment; but if he has suffered injustice in this respect he has brought it on himself by not producing his books at the trial under the notice he had received for that purpose. Their non-production may have influenced the jury in coming to the conclusion that if they had been produced, they might have shown a more favourable state of the account between him and *Webb* than he was disposed to admit by his evidence. Upon the whole we think the rule for a new trial should be discharged with costs.

SAWYER v. GRAY.

WHERE a stock broker sells shares on his own account and not in the ordinary course of business to a customer with whom he has had previous dealings as a broker, and who may, therefore, rely on his judgment, it is his duty to communicate the fact to the purchaser. The absence of such a communication is sufficient ground to set aside a verdict.

WILKINS, J., now, (August 5th, 1872,) delivered the judgment of the Court:—

The writ in this cause, which was tried before his lordship the Chief Justice, and in which the jury found for the defendant, contains, *first*, a count founded on an alleged employment by plaintiff of defendant, being a stock and share broker, to purchase stock as therein alleged; *secondly*, the common counts in assumpsit. The defendant pleaded, to the whole writ, *first*, "never indebted;" *secondly*, that he did not enter into the alleged agreement; *thirdly*, that defendant was owner of certain shares in the Nash Brick & Pottery Company, and offered a certain number of these shares to plaintiff for \$550, which plaintiff accepted and paid for; that said shares were duly transferred on the books of the said company to the plaintiff, and that he has subsequently treated the shares as his own, attended meetings, &c., as holder and proprietor thereof; concluding with an averment negating plaintiff's allegation, "that the \$550 was received by him under the agreement stated in the writ. The fourth plea need not be noticed, because it does not materially differ from the third. The learned Chief Justice put the case to the jury mainly on the question whether of vendor and vendee, or of principal and broker, in which the parties at the time of the contract stood to each other. The plaintiff's counsel having contended that the defendant had not proved under his third and fourth pleas that the shares had been duly transferred, and having also contended that the \$50 paid by plaintiff to defendant in excess of \$500 for the shares had not been accounted for by the defendant, his lordship reserved those points for the consideration of the Court. A rule granted to set aside the verdict as against law and evidence, and on the points thus reserved, was argued before us in this present term.

In the conflict of evidence reported as to the actual contract between the parties, it must be taken that the jury have

shown by their verdict that they adopted the defendant's statement, and concluded that the shares in question were sold to the plaintiff by the defendant in his private capacity, and not as a stock and share broker. That raises the primary question,—can the plaintiff under the facts rescind the actual contract by his own act without express repudiation or demand, and have recourse to his count for money had and received? I entertain no doubt that he can, (notwithstanding the long interval between the contract and action brought,) seeing that, while he has derived no benefit whatever from the contract, he has done nothing under it to the prejudice of the defendant, or to alter his position in relation to it from what it was when it was entered into.

The plaintiff's particulars, which may be applied to the money count, inform defendant that one branch of the plaintiff's claim is for \$550 cash paid by cheque. The third plea not only may be applied, but being a plea to the whole declaration, is necessarily applied to the money count, and says for answer to the plaintiff's allegation, "You, the defendant, have in your hands \$550 of my money;" "I received your money for shares in the particular company which I offered to you and you accepted, and I have duly transferred them to you in the books of the company, and you have since then treated them as your own, &c." The defensive allegation thus made cannot be separated into parts, but forms as a whole, the alleged matter of defence, and must be proved as a whole. It admits receipt of the money and seeks to avoid it by the matter thus stated. Involved in it is an allegation that the shares offered and accepted were duly transferred. Among the documents produced at the trial and received without opposition, is a registered bye-law in these words: "No transfer of any share or shares shall be held valid unless the same shall have been in the first place offered to and refused by the company, and in all cases the share or shares of every stock-holder shall be liable to the company for all debts in any wise incurred by such stock-holders to the company, all transfers to be subscribed by the parties in the company's books.

Viewing this, as we must view it, in connection with the third plea, the plea in effect contains an allegation that this

bye-law was complied with by the defendant in relation to the shares sold. But that allegation is not proved. It is observable that the vendor of these shares alone could perform the condition of this bye-law, on the performance of which the validity of a transfer is by it made to depend, for the offer to and refusal by the company must precede the transfer. To the plaintiff's independent claim on the money counts there is, beside the special plea above considered, no plea except "never indebted." Of that, of course, the sole effect would be a defensive allegation that the defendant never received from the plaintiff \$550,—a fact which is not in controversy. It was, therefore, indispensable for the defendant to prove his third plea.

But there is a view of this case which, independently of all that has been observed, would make it our duty to send it back for re-trial. The defendant is proved to have been at the time of the transaction in question a stock-broker, and to have acted as such, and with this very plaintiff, in matters of business unconnected with the present case. In this state of things it was, of course, that plaintiff reposed confidence in the defendant; and it was most probable, if not a matter of course, that when, the subject of negotiation between the parties was, as in the case before us, the purchase of stock, the plaintiff, unless in the most distinct and precise manner informed to the contrary by the defendant, should consider that he was dealing with the latter in his character of agent, and not as a private individual. Now after a careful examination of the evidence given by the parties, I am of opinion that by the defendant's own showing he did not in this transaction by his language so guard the plaintiff from misapprehension as to prevent deception on the point adverted to, and did not make such disclosures in relation to the mode in which he had become owner of the stock sold, and the price he paid for it, and what he knew to be the estimation of its value by some other persons than himself, which his position relatively to the plaintiff, and the exigencies of good faith demanded. See *Story's Agency*, sec. 21, which, assuming plaintiff to have been under an impression that defendant was acting for a third party, is very suggestive. The plaintiff says, and he is not contradicted by the defendant,

"I asked the market price," (referring to this very stock) "he said they were selling at par." That very day the defendant, (who did not communicate the fact to the plaintiff) had purchased stock in this company at a large discount.

The defendant entertaining indeed, as he says, an opinion that the stock would pay 14 per cent.,—an opinion of the grounds of which plaintiff knew nothing,—and asserting in contradiction of the plaintiff's assertion to the contrary, "the plaintiff did not employ me as a broker," does not pretend that in making the contract he used language to the plaintiff stranger or fuller of information than this: "He wanted to invest in a company that would pay a higher dividend. I said I would sell him some shares in the company. Again, he says in very general terms: "He bought from me. He knew the exact position of the company." This bold general language contrasts very strikingly with the full and detailed narrative of negotiation and conversation given by the plaintiff. Considering the antecedent business transactions of the parties, and the position of the defendant at the time of the contract, relatively to the public and to the plaintiff, I think it was proper and necessary in order to disabuse the personal confidence of the plaintiff in the defendant, which the former possibly and probably felt, that the defendant should have used to the plaintiff some such language as this: "Understand that, in regard to this stock, I am not acting for a third party and for you, as I have acted, but for myself alone, in view of my own interests as owner of the stock, and as desirous to sell it in the best market. I consider it a good investment, but I will not conceal from you that some do not estimate it as highly as I do, for I have lately purchased the same stock at a discount of 25 per cent. Do not, therefore, rely as you have been in the habit of relying, on my judgment; use your own, or that of your friends." I think the mere consideration alone that such language was not used, a sufficient ground for our making the rule absolute.

WILSON v. THE MERCHANTS' MARINE INSURANCE COMPANY.

An action is not maintainable as for a total loss of freight where it appears that the vessel might have been repaired at a reasonable cost within a reasonable time, and conveyed a portion of the cargo to the port of destination.

Where a policy of insurance was issued on freight on a voyage "at and from *Buenos Ayres* to *Matanzas, Cuba*," and there was an endorsement on the policy: "Permission granted under this policy for barque *Daniel* to proceed from *Monte Video* to *Cardenas*, calling at *Barbadoes* for orders instead of *Buenos Ayres* to *Matanzas*."

Held, that the policy and the endorsement must be read together, and, that so read, the voyage insured must be taken to have been a voyage from *Buenos Ayres* to *Cardenas* with liberty to go to *Monte Video* as an intermediate port.

WILKINS, J., now, (August 5th, 1872), delivered judgment as follows:—

This was an action upon a policy of insurance on freight laden on board the barque *Daniel*, on a voyage at and from *Buenos Ayres* to *Matanzas, Cuba*. There is an indorsement on the policy dated 28th of *April*, 1869, to the following effect; "Permission granted under this policy for barque *Daniel* to proceed from *Monte Video* to *Cardenas*, calling at *Barbadoes* for orders instead of *Buenos Ayres* to *Matanzas*." The cause was tried before his Lordship the Chief Justice, at *Halifax*, and the jury found a verdict for the plaintiff for the full amount named in the policy. At the argument of the rule to set aside the verdict, several grounds were taken, but in my view of the question it is only necessary to decide on one of them, to the effect that there was not an actual or a constructive total loss of freight. The material facts are as follows: The cargo, consisting of jerked beef, laden in bulk on board the barque, from a peril insured against, was damaged at *Monte Video* on the 23rd of *February*, 1869. The master, a part owner, though not registered, substantially thus described the damage to the cargo. On opening the hatches all of it that could be seen was wet—the beef then seemed rotten—it got very little worse while it remained on board, in a month, the earliest time practicable, it was removed and landed in a dry condition. He says "he at first was unable to procure a place for storing the beef, but he ultimately succeeded in doing so." The beef, he says, had a bad smell, and was magotty, and part of it was thrown overboard.

There were two surveys on the cargo. By the first, held on the 12th of April, it was found that some of the beef was damaged by salt water, caused by the working of the ship. The second was held on the 17th of that month. The surveyor thereby reported that a large quantity of beef was damaged by sea water, and recommended that the sound beef should be delivered to the purchasers and the damaged (considering the kind of cargo) thrown overboard. The beef was not, however, totally destroyed, for the master sold about one-half of it though as damaged, and at about one-third of the cost. About one-half of the cargo was purchased and carried away from *Monte Video* in a foreign vessel. That portion of the beef he says was not all good. The captain thus describes his efforts to send the cargo on. I advertized for vessels to take the cargo on, could not get any, all the vessels at *Monte Video* were chartered by the round. He adds: I did not myself apply to any vessel to take the cargo on. A witness, *Barra*, doing business in *Buenos Ayres*, says: "It was almost impossible to get vessels to take cargo. Vessels on a round voyage or for home use were chartered." Now of course an absolute total loss of freight by destruction—annihilation of the whole cargo is an idea precluded by the facts of the case. That portion of it which was sold might, for any thing that appears to the contrary, have been reshipped and conveyed to the port of destination—if the means of transporting it could have been obtained by the master. The contention at the argument for the defendants' was that the plaintiff, on whom, of course, the burthen of proof lay, had not shown that the master had, in the place and under the circumstances of his position, done what the law required of him in order to procure a means of transhipment and conveyance forward of the cargo remaining; that the facts show no sufficiently extensive loss to make the policy attach as for a total loss of freight, and especially that the plaintiff having failed to show, as the law would have required him in an action on a policy insuring the ship, to show a constructive total loss of the vessel which existed specifically in the character of a ship; there was in the case a failure of proof that the barque *Daniel* might not have been repaired, and would not have been repaired by a prudent owner so that she could have

carried the cargo forward to the port of ultimate destination. My opinion is that such proof is indispensable to maintain this action, that there is an entire failure of it, that such a necessity for sale of the portion of the cargo sold as would make the sale a legal sale by the master, has not been shown, and that therefore it does not appear but that the insured might have earned in respect of a portion of the cargo at all events, the freight, for the loss of which he seeks to make the defendant liable under the policy as for a total loss. If we direct our minds to an inquiry into the question of the practicability of repairing the vessel at *Monte Video* in view of the principles that govern what is familiarly called the prudent-owner question, we find the evidence presented coming very far short of the evidence demanded. The facts in proof may be stated in substance as follows: On the 23rd of *February* the barque encountered a pampero when riding at anchor in *Monte Video*. A survey was called on the 27th. Nine inches of water were found in the well which, an hour after, had increased to thirteen inches. The topsides were found good, the calking in some places slack, the stanchions, covering-board and waterway sound, while the water in her was, by the surveyors from these premises, inferred to be made below the waterline. They therefore recommended her to be lightened to her copper and then resurveyed. They concluded by estimating her then value to be £730. The master says she was sold—she was not fit to go to sea. I would not have gone in her, she was opened and strained at the topsides. He adds, "She was built of white English oak in 1868 or 1867. She was in good order and fit for the voyage at *Buenos Ayres*, she remained at *Monte Video*. I left her there afloat a fortnight after the discharge of the cargo. She was leaking some but could be easily kept free. No repairs were put on her before I left. Three hours of one man or one and a half of two would keep her free."

Now it is incontrovertable that consistently with all this, not only would it be perfectly competent to a jury to find that the prudent owner would repair, but it is not possible to suppose that they could find otherwise on the facts stated. Many of the points of law discussed at the argument and in relation to which cases were cited, are no longer *re-critic*

questiones but *res judicatae*, in respect of which reference to a good text writer would have sufficed. *Arnold*, one of them says, p. 694, last edition by *McLachlan*, "if both ship and cargo have been justifiably (*i. e.*, under extreme necessity) sold abroad the assured may, without notice of abandonment, recover as for a total loss of freight. It is otherwise if the sale is unjustifiably made where the ship might have been repaired or the cargo sent on, so as to earn freight, and in such a case were notice of abandonment unaccepted cannot alter the rights of the parties." The same learned authority says (p. 967) "where the original ship can be repaired in a reasonable time, or the cargo may be sent on in a substituted ship at a reasonable amount of cost and trouble, and with a fair hope of its ultimately arriving in specie or in a merchantable state at its port of destination, the master is not justified in selling, and the ship-owner will not be entitled, on the ground of the master's negligence or improper conduct, in selling the goods instead of forwarding them, to give notice of abandonment and recover as for a total loss on freight." We are necessitated to view this case under the facts as if it appeared affirmatively that the barque could have been repaired at a reasonable cost and within a reasonable time, and could have put to sea and conveyed that portion of the cargo which the master sold, to the port of destination. Then, as regards that (to use the language of *Yates, J.*, in *Saltus v. Ocean Insurance Company*, 14 John., p. 143, used by him in relation to a state of facts identical with that which I have just supposed to mark this case) the insurers on the freight policy were completely exonerated. The view which I have taken of the question before us and above expressed, impressed itself on the mind of the learned Chief Justice at the trial. In accordance with it I am of opinion that the rule for a new trial should be made absolute. That conclusion, as already intimated, is arrived at as a consequence of the opinion expressed on the particular ground referred to taken in support of the rule.

But I feel it impossible to dispose of this case without adverting to the proved fact that in relation to a portion of the cargo absolutely destroyed by perils of the sea, freight insured to the plaintiff was not, and after the disaster could

not, have been earned by him. Of course it becomes important to inquire in this last aspect of the case whether that destruction was caused in the course of the voyage insured. I am of opinion that the original policy and the endorsement on it must be read together, and that so read the voyage insured must be taken to have been a voyage from *Buenos Ayres* to *Cardenas* with liberty to go to *Monte Video* as an intermediate port. If this be the true construction a liability by the defendant company was incurred and should be responded to by it in regard to that portion of the beef which was destroyed by sea damage within the risk. The extent of this liability for a partial loss expressed in pecuniary amount may be ascertained by agreement of the parties or by reference to a master. If the plaintiff consents that the amount shall be thus ascertained, and the defendant company agrees to pay it, the plaintiff will have judgment for whatever it may be, as also for his costs of suit, including the costs of the trial but not those of the argument. If this arrangement be not assented to by both of the parties the rule will be made absolute for a new trial, with costs.

CHISHOLM ET AL. v. CHISHOLM ET AL.

PLAINTIFFS consigned goods to the defendants to be sold, and the proceeds handed over to D. S. D. S. being indebted to defendants gave to them a promissory note for the amount, and died leaving his estate in an insolvent condition. An action having been brought by the executors of D. S. in the name of plaintiffs to recover the amount arising from the sale of the goods.

Held, that defendants were entitled to offset the amount of the note given by D. S.

SIR W. YOUNG, C.J., now, (August 5th, 1872.) delivered the judgment of the Court:—

The plaintiffs complained in this action that the defendants had not sold and accounted for certain goods of theirs put into defendants hands for sale, and under the common counts they claimed \$333 for money received to their use. Their principal witness at the trial was one of the executors of *Donald Scott*, who proved that the plaintiffs consigned the goods to the defendants to be sold and the proceeds handed over to *Scott* in part payment of a debt which they (plaintiffs) owed him.

This witness also proved that he had commenced this suit on the written authority of the plaintiffs, which he produced. It appeared, therefore, to the Judge on the trial, as we also thought at the argument, that the plaintiffs had no control over the proceeds appropriated to the use of *Scott* for a valuable consideration, and that his executors were the real plaintiffs. In that view the admitted net proceeds being \$297.32, were in the hands of the defendants claimable by the executors, but subject to any legal set-off. The date when the goods were delivered to the defendants and the above balance ascertained did not appear, but it was shown that *Scott* on the 13th *November*, 1870, gave a note to the defendants at three months, and falling due, therefore, on the 14th *February*, 1871, for \$516. *Scott* died 6th *December*, 1870, and there is reason to believe that his estate is insolvent. The object of this suit, therefore, in using the plaintiff's name, is to recover not to their own use but to the use of the executors, the proceeds of the goods with costs, and leave the defendants to their dividend on the note, or as it is called by a misapprehension, the acceptance of *Scott*. Now if this could be done legally it would certainly be an injustice to require the plaintiffs to pay, on the one hand, in full the amount they owe and are willing to credit to *Scott's* estate, and on the other hand, to receive what may be a small dividend on the debt the estate owes them. This would not be allowed in a case of bankruptcy,—and we see no adequate reason for allowing it to be done by an executor any more than by an assignee. The action was brought after notice by the attorney on the 3rd *February*, 1871, and on the 6th the defendants put in their claim on the estate for the \$516, less \$297.32. This was the first time the proceeds were ascertained, and an objection might lie on that ground to the action brought on the 3rd, and then the plaintiffs would be reduced to a claim for nominal damages on the first count. But without running into these niceties, and looking into the two demands as subsisting in point of fact at the same time, we think that the defendants are entitled to their set-off, and therefore that the nonsuit ordered by Mr. Justice *Ritchie* should be dismissed with costs.

HAMILTON v. PICKLES.

When a plaintiff has recovered in ejectment some portion of the lands described in his writ, but it does not clearly appear by the verdict to what portion of the premises claimed he is entitled, the verdict will not be set aside for uncertainty, as the Court will not assume that he will attempt to recover possession beyond what he is entitled to. The verdict is ample authority for this, and the plaintiff must ascertain the line at his peril.

McCULLY, J., now, (August 5th, 1872,) delivered the judgment of the Court:—

This was a rule *nisi* to set aside a verdict in ejectment obtained at *King's* by the plaintiff, upon the ground that it did not sufficiently clearly appear by the verdict to what portion of the premises claimed the plaintiff was entitled to judgment. It was admitted on the argument that plaintiff had by the verdict recovered some portion of the lands and messuage described in his writ. The Court have had no difficulty under such circumstances in arriving at a decision. Before the *Common Law Procedure Act* of 1852, the rule in *England* was that the plaintiff executed his writ of *habere* according to what he actually recovered in the suit and upon his own responsibility. In *Ablett v. Skinner*, 1 Siderfin, 229, the declaration was for a fourth part of a fifth part, and the title of plaintiff was only to a third of a fourth of a fifth, being only a third of what was declared for, and it was said that plaintiff could not have a verdict because the verdict ought to agree with the declaration. But by the Court the verdict may be taken according to the title. Cited in last edition of *Selwyn's Nisi Prius*, 680; and in *Denn v. Burges*, 1 Burr., 326, Lord Mansfield said: "The plaintiff shall recover according to his title, and it is no objection to his recovering what he is entitled to that he has demanded more. Again in *Guy v. Rand*, Cro. Eliz., 12, it is said if ejectment "be brought for one hundred acres, plaintiff may recover forty." In 8 *East*, 357, the Court gave leave to enter the verdict according to the Judge's notes for a messuage only, leaving out the word "tenement." *Tidd's Prac.*, 4th ed., 796; *Roe d. Saul v. Dawson*, 3 Wils., 49, in ejectment for five-eighths of a cottage the sheriff gave possession of the whole. Held that the tenant should be restored to his possession of three-eighths. In *Morres v. Barry*, 2 Str., 1180; *Roe v. Power*, 2 N. R. 1, the

doctrine is laid down that the Court will make every possible intendment to support the judgment. A bare possibility of title consistent with the judgment will be sufficient. *Selwyn's N. P.*, 682. In *Connor v. West*, 5 Burr., 2673, it is laid down that the sheriff delivers possession on the showing of the plaintiff, who is at his peril to take possession of no more than he is entitled to; and if he take execution for more than he is entitled to, or than the recovery warrants, the Court will interpose in a summary way, and restore the tenant to the possession of such part as was not recovered. 1 Burr., 326; *Per Lord Mansfield, C. J.*, and *Doe v. Dawson*, 3 Wils., 49.

The Court will not anticipate that plaintiff will attempt to recover possession by a writ of *habere* beyond what he is entitled to under his verdict, namely, up to the line run by *Johnston*. If he does this and no more his verdict is ample authority. He must ascertain where that line is at his peril, to use the language cited, and govern himself accordingly. The rule *nisi* for a new trial must be discharged with costs.

ANDERSON v. ARCHIBALD.

PLAINTIFF sold to defendant a quantity of hides, some of which, under the defendant's instructions, were delivered to his agents, A. & Co., who gave to plaintiff their note for the amount due him. Plaintiff thereupon entered in his book "settled by note of \$123." A. & Co. having become insolvent, the note was dishonored.

Held, that the jury were not warranted in regarding the entry in plaintiff's book as evidence of anything but a conditional payment.

Also, that defendant, not being a party to the note, there was no necessity to give him notice of dishonor.

DESBARRES, J., now, (August 5th, 1872,) delivered the judgment of the Court:—

This was an action for goods sold and delivered, in which his lordship the Chief Justice before whom it was tried, told the jury that there were two questions raised by the pleadings and evidence for their consideration. 1st, whether the plaintiff had accepted the note of *Archibald & Co.* in satisfaction of the debt for which the action was brought, or accepted it for the accommodation of the defendant, and as a conditional payment only; and 2ndly, whether the credit for

the goods had in fact been given to the defendant or to *Archibald & Co.* The jury found a verdict for defendant on the questions submitted to them, and we are now called upon to decide, after hearing the argument of the counsel of the parties under the rule granted for setting it aside, whether the verdict so found is consistent with the law and facts of the case, or so much at variance with both as to entitle the plaintiff to a new trial. The plaintiff's case rests altogether on his own evidence. The defence rests on the evidence of *John Archibald* and *Thomas Archibald*, who, during all the time the goods (calf-skins) were shipped, were doing business in this city as copartners, but have since failed, and acting as the agents of defendant, who resided at Musquodoboit. The plaintiff in his examination stated that he agreed to deliver all his calf-skins to defendant at 90 cents each, and that he did deliver them in five different lots, the first to one *James Cooper*, under an order which was produced; the second to defendant himself; the third to one *Erskine Archibald*, also under an order of defendant, which was lost; the fourth to *Abraham Higgins*, on another order of defendant, which was lost; and the fifth to *Archibald & Co.*, under a letter of defendant; the whole amounting to \$243. That defendant gave him a note made by *Archibald & Co.*, at the delivery of the second lot of goods, for \$120, which was paid, and there was also payment of \$6; that plaintiff mailed a letter to defendant about the end of *September*, 1867, to which he received a reply on the 2nd *October*, enclosing an order on *Archibald & Co.*; that having such order he called upon *Archibald & Co.*, and received from them a note for \$123, dated 7th *October*, 1867, payable at three months; this note was endorsed by plaintiff to *James Graham*, as a payment, and by him to *Charles Graham & Co.* It was placed in the *Bank of Nova Scotia* and dishonored, and the plaintiff having received a notice of its dishonor, took up the note on the 20th *January*, 1868. In his cross-examination he says defendant owed him for 113 calf-skins at the time he received the note from *Archibald & Co.* for \$120; that he took the note for \$123 from *Archibald & Co.* in payment of the balance due to him to accommodate the defendant, and made in his book this entry, "settled by note of \$123." In conclusion he says he

credited the defendant alone, having trusted *Archibald & Co.* to the amount of \$155 for skins in 1866, for which he was paid. On the part of the defence *John Archibald*, one of the firm of *Archibald & Co.*, was called as a witness, who stated that plaintiff and defendant came to him in 1867 and said defendant had agreed to take plaintiff's calf-skins for the year, and plaintiff would give them if we would undertake to pay for them as before, which we agreed to do. The witness produced the ledger of *Archibald & Co.* at the trial, showing their account with plaintiff in 1866 and 1867, and also their account with defendant; that after charging defendant with the note of \$123, they (*Archibald & Co.*) still owed defendant \$275. In his cross-examination he stated that *Archibald & Co.* were the agents of defendant, and had no interest in his business, only a commission on his sales; that their account was with *M. & E. Archibald*, the latter, *E. Archibald*, having no interest in their business; that on the 7th October, believing the firm perfectly solvent, he signed the note payable for \$123, but did not see any order of defendant, a statement at variance with that of the plaintiff, who says he called on *Archibald & Co.* with defendant's order, and received from them the note for \$123; that the account in the ledger was kept against the defendant alone. *M. & E. Archibald's* account being kept on another folio; that an assignment of their property was made on the 4th November, 1867. The note, he says, was not charged in their book, though the skins were, varying, in this particular, from the statement made in his direct examination. *Thomas Archibald*, the partner of *John*, states that he took delivery of skins in 1865 and 1866 from plaintiff, and that they (*Archibald & Co.*) took delivery of skins in the same way in 1867, though he was not positive that they did so in that year.

This is the whole of the evidence on both sides, and the question is whether it is sufficient to sustain the verdict, or whether there ought to be a new trial, as contended for on the part of the plaintiff. Looking at the evidence as I have done, carefully, I must say that there is nothing in it to satisfy my mind that the note for \$123 was given to and accepted by the plaintiff in satisfaction of his debt, and I must therefore presume from their finding that the jury gave to the entry in the

plaintiff's book, containing the minute already referred to, viz., "settled by a note for \$123," a construction and an effect the entry itself was never intended to have, by regarding it as evidence that the note had been taken and accepted in satisfaction of the debt, when it ought, as it appears to me, to have been regarded as a mere entry to mark the fact that a note had been received, which, if paid, would be a satisfaction of the debt. That such is the construction that ought to have been put upon it is, as I think, abundantly clear. I will briefly refer to a few of the cases which, in my apprehension, sustain the view I have expressed. In *Stedman v. Gooch*, 1 Esp., N. P., 5, Lord *Kenyon* says: "The law is clear that if in payment of a debt the creditor is content to take a bill or note payable at a future day he cannot legally commence an action on his original debt until such bill or note becomes payable or default is made in the payment, but that if the bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer in his hands and who, therefore, refuses to pay, in such case he may consider it waste paper and resort to his original demand and sue the debtor on it. Here the makers afterwards failed and could not pay when the note arrived at maturity. In *Owenson v. Morse* 7 T. R., 64, it was held that if the seller of goods takes notes or bills for them without agreeing to run the risk of the notes being paid and the notes turn out to be worth nothing they could not be considered payment. Lord *Kenyon*, in that case, said: "If the plaintiff had agreed to take the notes in payment and to run the risk of their being paid, that would have been considered as payment whether the notes had or had not been afterwards paid, but without such agreement the giving of such notes is no payment." In the present case there was no such agreement. In *Maillard v. The Duke of Argyll*, 6 M. & G., 40, it was held "that a plea that bills were taken and received by the plaintiff for and on account of the debt and in payment thereof," did not necessarily import satisfaction, and, in *Kemp v. Watt*, 15 M. & W., 672, the word "discharge" was held to carry the matter no further. In *Bottomley v. Nuttall*, 5 C. B., N. S., 122, *Byles, J.*, says: "It is the first learning that taking a bill for and on account of a debt does not operate as an absolute discharge of the

debt. At the most it is only a conditional payment which is defeated by the subsequent dishonour of the bill whether total or partial." Then there is the case of *Maxwell v. Deare*, 8 Moo., P. C. C., 376, in which *Sir John Jervis*, in delivering judgment for their Lordships, says: "that their Lordships considered it quite plain, looking at the correspondence, that the object was to substitute a bill of exchange for a cash payment as a mode of payment, but only to be considered as if the bill was duly honoured at maturity," which is all that I think was done here.

It is unnecessary to multiply cases on this point; those I have referred to are, I think, sufficient to shew that the jury were not warranted by the evidence in this case in finding that the plaintiff accepted the note of *A. & Co.*, in satisfaction of the debt in the face of the positive testimony of the plaintiff that he took the note for the accommodation of defendant.

As to the second question submitted to the jury, viz., whether the credit had in fact been given to the defendant or *A. & Co.*, there seems to me but one conclusion to which the jury ought to have arrived under the evidence given by the plaintiff to the effect that the credit was given to the defendant and to him alone. All the circumstances connected with the sale and delivery of the goods, the orders given by defendant from time to time to receive them, the application made to plaintiff by defendant by letter of *September, 1867*, for payment, and defendant's reply thereto enclosing an order on *A. & Co.* for the amount claimed, stating that if they (*A. & Co.*) gave plaintiff a note instead of the money, he (defendant) would pay the discount, go to shew, as I think, unmistakeably, that the credit was given to defendant and not to *A. & Co.*, and upon that point as well as the other, I am of opinion that the jury were not at liberty, under the evidence, to find a verdict for defendant. But it was contended by the learned counsel on the part of the defendant that if the credit was given to the defendant, the plaintiff not having given notice of the dishonour of the note taken by him from *A. & Co.*, was not entitled to recover, and our attention was directed to the case of *Peacock v. Pursell*, 14 C. B., N. S., 728, and *Smith v. Mercer*, L. R., 3 Exch., 30, as cases sustaining this position. In the case of *Peacock v.*

Pursell, the defendant indorsed to the plaintiff a bill of exchange as collateral security which had been endorsed to him by the payee and was accepted. The plaintiff kept the bill, and when it became due neglected to present it or to give notice of dishonor, and it was held, as I think very properly, that as between the plaintiff and defendant the laches of the plaintiff made the bill equivalent to payment. Here the defendant was no party to the note taken by plaintiff from A. & Co., and there was no necessity to give him notice of its dishonour. See *Swinyard v. Bowes*, 5 M. & S., 62.; *Van Wart v. Wooley*, 3 B. & C., 439. In *Smith v. Mercer*, the question was raised whether, under the circumstances of that case, recourse could be had to the defendant. It was an action for goods sold, which were to be paid for "by cash or approved banker's bills." The defendant sent the cash for the goods to his broker within the time named, who instead of paying it over to the plaintiff, obtained a bill of exchange from a banking company, which he indorsed to the plaintiff. The bank from whom the bill was obtained failed and the drawees declined to accept. Notice of dishonour was given by the holders to the plaintiff, the broker and the banking company, but no notice was given to the defendant, who was not aware until applied to by the plaintiff that the latter had not been paid. The Court held that as plaintiff might have insisted on the defendants indorsing the bills, their liability was the same as if they had indorsed, and they were therefore discharged because they had not received due notice of dishonour. The circumstances of that case were very different from the present. Here there was no indorsement of the note taken from A. & Co., and no necessity for notice of dishonour to defendant, who has sustained no loss for want of such notice.

I am of opinion, on full consideration of this case, that the verdict cannot be sustained, and that the rule nisi for a new trial ought to be made absolute with costs.

MARTIN v. TAYLOR.

DEFENDANT'S servant, while driving at a rapid pace on the wrong side of the road, came into collision with plaintiff's horse, whereby plaintiff was injured. There being no contributory negligence on the part of plaintiff.

Held, that defendant was liable.

MCCULLY, J., now, (August 5th, 1872,) delivered the judgment of the Court:—

This was an action by plaintiff against defendant for the negligent driving of a horse and carriage by defendant's servant whereby plaintiff was injured, &c. It was tried before Mr. Justice *DesBarres*, and a verdict of \$10 given in favor of plaintiff. Defendant obtained a rule *nisi* to set this verdict aside, which was argued before Justices *DesBarres*, *Ritchie* and *McCully*.

At the close of plaintiff's case defendant's counsel had moved for a nonsuit, which was denied. On a careful examination of the plaintiff's case, I think the learned Judge exercised a sound discretion in refusing the nonsuit, and I am clearly of opinion that if he had nonsuited the plaintiff there would have existed grounds for setting the nonsuit aside and ordering a new trial.

The testimony of defendant's witnesses was in many respects contradictory, and in almost every respect inconsistent and irreconcilable with that of plaintiff's witnesses. The learned Judge put this fairly to the jury, and I do not find any reason for complaint as regards the way in which he stated the law to them. The defendant's servant was passing up west on the right hand side of the centre of *Spring Garden* road with a carriage at a rapid pace, at least seven miles per hour, perhaps more; some one of plaintiff's witnesses say 11 or 12. Plaintiff's milkman was going south on *Dresden Row*, which crosses *Spring Garden* road at right angles. At the point of junction, and just as plaintiff's horse had reached *Spring Garden* road and was beginning to cross, the two horses came in contact. According to the statutory law of this Province, defendant being to the right of the centre of the street was on the wrong side of the road. In *Chaplin v. Hawes*, 3 C. & P., 554, it is laid down by *Pest*, and approved

by text writers, that, "though the rule of the road is not to be adhered to if by departing from it an injury can be avoided, yet where parties meet on the sudden, and an injury results, the party on the wrong side should be held answerable, unless it appears clearly, that the party on the right had ample means and opportunity to prevent it." Assuming this to be the law, it, I think, concludes the defendant.

As regards contributory negligence, and whether there was any or no on the part of plaintiff, that was fairly put by the Judge, and its consequences explained to the jury, and they have by their verdict negatived it. Because, as said by *Pollock* in *Williams v. Richards*, 3 C. & K., 82, the injury to plaintiff must have been caused by defendant's negligence only, without the negligence of plaintiff contributing in any way to the accident."

Upon examining the leading cases, and carefully considering those cited on the argument, I am of opinion that there is no ground for disturbing the verdict in this case, and the rule *nisi* must therefore be discharged.

OVERSEERS OF POOR v. McLELLAN.

On an application for an order of filiation, there was no clear admission on the part of the reputed father, and no fact of intercourse sworn to except by the mother, whose evidence was shaken in many essential points. The conviction was quashed on appeal, and a new trial granted.

SIR W. YOUNG, C. J., now, (August 5th, 1872,) delivered the judgment of the Court:—

This is an appeal from an order of filiation tried before Mr. Justice *Dodds*, at *Pictou*, in *June*, 1871, under circumstances of an unusual kind. The defendant is a married man, occupying a respectable position in society, and the mother is of tender age brought up in his house from childhood, and, if she were seduced by him, must be regarded as the victim of a more than ordinary licentiousness. It is not to be wondered at, therefore, that the trial and the argument before us showed a strong feeling in the defendant and his counsel. This was

aggravated by the fact that the girl in the first instance charged another party with being the father in the form required by the statute, and that she now alleges that the first oath was made falsely at the instance of defendant and his wife, all of which they deny. They must be admitted, however, to have committed themselves by some imprudences, which doubtless induced the jury to sustain the order of filiation by a majority of seven out of nine.

With these facts the case demands an investigation of the principles that should guide us in a case of bastardy in awarding or rejecting a motion for a new trial. It does not depend upon the ordinary rules which render us so unwilling to set aside a verdict upon the mere weight of evidence, but upon the nature of the charge, and the way in which our own Legislature and that of the mother country have regarded it.

Our original *Bastardy Act* and the decisions of this Court, treated such an appeal as a criminal inquiry, (see also *Rex v. Archer*, 2 T. R., 270,) and the reputed father was not admitted as a witness. The unsupported evidence of the mother, therefore, was sufficient to convict him. This was opposed both to the spirit and the letter of *English* legislation. It is enacted by the *Imperial Statutes*, 7 & 8 Vic., chap. 101, sec. 3, and 8 & 9 Vic., chap. 10, sec. 6, that before an order of filiation can be made, the evidence of the mother must be corroborated in some material particular by other testimony, to the satisfaction of the Justices. "This rule," says *Taylor* in his work on *Evidence*, sec. 702, "has been wisely established in order to protect men from accusations which profligate, designing, interested women might easily make, and which, however false, it might be extremely difficult to disprove." There are several decisions in *England* on what is to be accounted material evidence, and on the form and contents of the order. See the *Digest of Magistrates' Cases*, 7-8; the case of *Hodges*, 2 L. T. R., N. S., 190; *Reg. v. Read*, 9 Ad. & El., 619; and the Act.

Our own *Revised Statutes*, 3rd series, have to some extent adopted these principles. Chapter 91, it is true, does not in terms require corroborative evidence of the charge, but it permits the reputed father to give evidence, and directs in section 9 that on appeal "the whole matter may be heard and

tried by a jury as a civil action." Where the mother, therefore, and the reputed father are both examined and directly contradict each other, and there is no sufficient corroboration of the charge, the ordinary rule to some extent would seem to apply, and it is a hard thing to sustain a conviction under these circumstances, affecting the domestic peace and the social standing of the accused.

The present law was obviously modified for the protection of the party charged, but it would operate very differently as regards this defendant. Formerly he could only have been convicted by an unanimous verdict of twelve, now he is convicted by seven out of nine, after being heard himself, too, under oath, and with a charge of subornation of perjury on the part of the girl. I forbear from going into the mass of testimony on the trial. There were several things done by the defendant which it is difficult to explain,—a want of firmness, of consistent and indignant denial,—which must have injured him with the jury. But there is no clear admission, and no fact of intercourse sworn to except by the girl, whose evidence is shaken in many essential points.

Upon the whole, then, we think that in establishing this verdict we might be setting a dangerous precedent, and lest we should be doing the defendant an injustice, we shall grant him a new trial, but we do not think him entitled to costs.

BANK OF BRITISH NORTH AMERICA v. BUDD ET AL.

SECTION 119, chapter 124, Revised Statutes, (3rd Series) in reference to joinder of different causes of an action in the same suit, applies only to civil suits and not to proceedings of a mixed civil and criminal nature.

Plaintiff's fourth count was as follows: "That the said bill of exchange and promissory notes above declared upon were discounted by the plaintiff, and the money advanced to the defendant therefor was so advanced upon the representation of the said T. G. Budd, that the said firm of Wm. L. Dodge & Co., the defendants, had assets to a large amount over and above all their indebtedness at the time said advances were made, and the plaintiffs say that in truth and in fact the said Wm. L. Dodge & Co., the defendants, had no such assets, as the said T. G. Budd well knew, and the said defendants obtained the discount and advances declared upon by false and frivolous representations, and under false pretences."

Held, bad on demurrer, 1st, because it did not allege that Budd obtained the discount and advances on the bill and note declared upon, with intent to defraud the plaintiffs; 2nd, because it did not allege that the debt had not been paid, and 3rd, because it did not allege the offences charged or not committed by Budd to be contrary to the statute.

DESBARRES, J., now, (August 5th, 1872,) delivered the judgment of the Court:—

Demurrer to the fourth count of plaintiff's writ or declaration by *Thomas G. Budd*, one of the defendants. The first count is on a bill of exchange drawn by *William L. Dodge & Co.* on *Thomas G. Budd* for \$650 in favor of *G. P. Black*, and by him endorsed to plaintiff. The second is a promissory note drawn by *Wm. L. Dodge & Co.* payable to *T. G. Budd*, for \$1500, and by *Budd* endorsed to plaintiff. The third is on a note drawn by *John Mosher* payable to *Wm. L. Dodge & Co.*, for \$265.87, and by them endorsed to plaintiff. And the fourth and last count, framed under section 92 of the *Insolvent Act of Dominion*, of 1869, is in these words: "That the said bill of exchange and promissory notes above declared upon were discounted by the plaintiff, and the money advanced to the defendant therefor was so advanced upon the representation of the said *T. G. Budd* that the said firm of *Wm. L. Dodge & Co.*, the defendants, had assets to a large amount over and above all their indebtedness at the time said advances were made, and the plaintiffs say that in truth and in fact the said *Wm. L. Dodge & Co.*, the defendants, had no such assets, as the said *T. G. Budd* well knew, and the said defendants obtained the discount and advances declared upon by false and frivolous representations, and under false pretences."

To this count there are no less than eleven different grounds of demurrer pleaded by *Thomas G. Budd*, to all of which it is unnecessary to refer. It is enough to notice those only on which the defendant relied at the argument before Mr. Justice *Wilkins*, Mr. Justice *McCully*, and myself, during the present term. From the sixth and following grounds of demurrer it will be at once perceived that this is an action of a novel and mixed character, being in fact a civil and criminal proceeding combined, in which it is sought to recover against the two defendants jointly the amount of the bill of exchange and notes sued for, and at the same time and in the same suit to proceed against *Thomas G. Budd* only, under section 92 of the *Insolvent Act of 1869*, for fraud, for which if convicted he would be liable to be and might be imprisoned for a period not exceeding two years. This being as we thought an

anomalous proceeding, my learned brethren and myself were anxious to be furnished with some authority or precedent for it, pointing out the mode and manner by which such an action can be tried; but no precedent or authority has been furnished, and we are therefore left to exercise our own judgment and form our own opinion in the matter.

It is true under section 119 of chapter 134, *R. S.*, different causes of action of whatever kind, except local, may be joined in the same suit, provided they be by and against the same parties and in the same rights; but this applies only to civil suits, and not to a mixed proceeding like this; besides it is not against the same parties. Having no precedent and no information as to the mode by which the provision of section 92 of the *Insolvent Act* of 1869 is carried out elsewhere, we see serious difficulties in the plaintiffs' way in this case, and are at a loss to know how a civil suit against both defendants, and a criminal or *quasi* criminal proceeding against one of the defendants only, can be prosecuted at one and the same time in this Court. We might ask, and we did ask at the argument, how the jury was to be empannelled and sworn and the verdict to be taken, and in what manner and form the judgment of the Court was to be entered up and enforced, but we did not receive satisfactory answers to these questions. It is right to say this, that we entertained doubts at the argument, which have not since been removed, as to the practicability of proceeding under section 92 of the *Insolvent Act* of 1869 in the form adopted here; but we are not drawn to the necessity of expressing, and in the absence of information we ought to have, we desire it to be understood that we do not now express any opinion on that point. Apart from, and independent of the doubts we have expressed in relation to the form of proceeding, and assuming that the plaintiffs may proceed against both defendants jointly for the recovery of his debt, and against one defendant separately for fraud in the same suit, we are all of opinion, upon the ground of misjoinder, and also on the following grounds, viz., that the fourth count of the declaration which is demurred to is bad, first, because it does not allege that *Thomas G. Budd* obtained the discount and advances of money on the bill of exchange and notes declared upon with the intent to defraud

the plaintiffs; secondly, because it does not allege that the debt has not been paid, and thirdly, that it does not allege that the offence charged against, or act committed by *Thomas G. Budd*, is contrary to the statute. On last ground see 6 Q. B., 100; 2 East., 333. We are all opinion, therefore, that there must be judgment for the defendants.

BAKER ET AL. v. BROWN.

PLAINTIFFS insured their vessel with defendants on time, the policy being stated to be "against total loss but subject to general average," and also containing the following special clause, viz.: "that the acts of the assured or assurers in restoring, saving and preserving the property insured in case of disaster shall not be considered a waiver or acceptance of the abandonment." The vessel was stranded in St. John harbour, and, after a careful and competent survey, declared to be so much damaged as to be not worth repairing, and the plaintiffs thereupon gave notice of abandonment to the defendants and ordered a sale of the ship. The defendants sent an agent to the spot who succeeded in a few days in having the ship floated and placed in a situation to be repaired, whereupon they notified the plaintiffs that they declined to accept the abandonment, and required the plaintiffs to take the vessel and repair her. The plaintiffs, however, proceeded with the sale, and the ship was bought in by the defendants, registered in the name of their agent and repaired and navigated at their cost and for their benefit for two years. Plaintiffs claimed for a total loss.

Held, that although it was not an absolute but a constructive total loss, notice of abandonment having been duly given, the liability of defendants attached:

That no special form of notice of abandonment was required provided the intention to abandon was clearly made out:

That as the plaintiffs had acted upon the judgment of competent surveyors that the vessel was not worth repairing, and upon their own bona fide opinion, they were justified in the abandonment and sale of the vessel:

And finally that although if, under the special clause in the policy the defendants, after repairing the ship had tendered her back to the plaintiffs the latter would have been bound to accept her, yet not having done so but retained her for their own benefit they must be held to have accepted the abandonment, and must therefore pay to plaintiffs the full amount of their claim.

YOUNG, C.J., now, (December 3rd, 1872,) delivered the judgment of the Court:—

This is a case of marine insurance which has been twice tried at *Yarmouth*, and on the second trial before Mr. Justice *McCully* in *September*, 1871, the plaintiffs, after the examination of about forty witnesses, obtained a verdict for the full amount of their claim with interest. Several legal questions of great interest arose upon the trial, which were argued before Judges *DesBarres* and *McCully*, and myself, in *July*, and to which I have given an attentive consideration, the more so as some of them are new and hitherto undecided in this Court.

The insurance was on the barque *Eliza Young*, of the burthen of 530 tons, owned by the plaintiffs, valued in the policy at \$13,000, and insured by the defendant and his associates for \$6000, there being another insurance of like amount with the Marine Association, also of *Yarmouth*. There was likewise an insurance with the defendant and others on freight, which does not enter into the present case. The policy on the ship was against time, from *September*, 1866, to *September*, 1867, and was "against total loss but subject to general average." Besides the usual labor and saving clause common to *English* and *American* policies, it contained what is known as the *Boston* clause, because in use there for many years, "that the acts of the assured or assurers in restoring, saving and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of the abandonment."

The writ is in the usual form, claiming as for a total loss, and the only material pleas are the fourth and fifth, denying such loss. There was no proof under the sixth, imputing misconduct to the plaintiffs, and no allegation of unseaworthiness, over-valuation, or fraud.

In *March*, 1867, the vessel sailed from *St. John, N. B.*, for *Dublin* with a cargo of deals, and on the same day was stranded in the harbor near *Navy Island*. Two of the port-wardens examined her several times as she lay between the 8th and the 14th *March*, and on the latter day, combined with three ship-builders in a final survey, declaring that in their opinion the ship was so much damaged that she was not worth repairing, and that it was for the interest of all concerned that she should be sold. They signed a further certificate of the value of the ship as she then lay, which they computed as worth \$2000 and no more. Information of these facts having been sent by telegram to *Yarmouth*, the plaintiffs on the 15th of *March* addressed the following notice to the defendant's company:—

"YARMOUTH, 15th March, 1867.

"Gentlemen:

"The barque *Eliza Young*, having been reported condemned, and to be sold in *St. John, N. B.*, and being insured in your office for the sum of \$6000 on hull and materials, and the

sum of \$2400 on freight from *St. John* to *Dublin*, we therefore, abandon her to the underwriters, and claim total loss of both vessel and freight.

"JOHN YOUNG,

" *For self and co-owners.*

" To the directors of the Atlantic Insurance Company."



One of the plaintiffs thereupon proceeded to *St. John*, and the Company sent also an agent on their behalf, and various negotiations took place there without any arrangement being effected. On the 15th *March* the two companies combined in a notice to the plaintiffs that they had telegraphed to *St. John* forbidding the sale until their agent arrived; and on the 29th *March*, the ship having by that time been floated by their agent and placed in a situation to be repaired, the defendant's company notified the plaintiffs that the directors declined to accept the notice of abandonment, and considered it the plaintiffs' duty to take charge of the ship and repair her. The ship, however, was sold by order of *Baker*, but on what day does not appear, and she was bought in for the two companies, registered in the name of *Mr. Ryerson*, their agent, and repaired, and navigated at their cost and for their benefit. This is an extraordinary feature of the case, unknown in *Yarmouth*, except by the directors or part of them as stated in the Judge's charge, until the recent trial, and having, as must be conceded, a material bearing upon the issue. The results of this speculation were by no means encouraging. The cost of removing the ship to a place of safety was \$779. The repairs cost with disbursements \$7499, except, the minutes say, "the expense of getting her off the rocks and the purchase of the hull and materials." At another place the expenses are stated at \$5857 not including purchase. There is some obscurity in these statements, and we are unable to check them by the accounts. But the result is clear enough. The vessel was ultimately sold by the two companies two years after the disaster for \$8000, with a loss of \$3000 divided between them.

At the trial the attention of the jury was called principally to two points,—the alleged acceptance of the abandonment by the defendant's company as presumable from their acts, and the value of the vessel as she lay on the rocks, and

whether she was then worth the cost of repair. Both these questions were left open to the jury, with a strong leaning in favor of the plaintiffs, but several other points arose upon the argument which we must also inquire into.

It was urged that this being an insurance against total loss, the defendant's liability attached only upon an absolute, and not upon a constructive total loss. I had occasion to look into this point in my recent judgment in *Morton v. Patillo*, ante p. 17, and adhere to the opinion I then gave, which is fortified both by an *American* and an *English* case not then cited. In the elaborate judgment of Mr. Justice Story in *Peele v. Merchants' Insurance Company*, 3 Mason, 40, he says: "A total loss in contemplation of law does not necessarily suppose the actual destruction of the thing insured. It may technically exist when the thing is in safety, but is for the time being lost to the owner, or taken from his free use and possession. In one of the latest cases decided by Lord Ellenborough, he observed, that the mere restitution of the hull, if the plaintiff eventually pay more for it than it is worth, is not a circumstance by which the totality of the loss is reduced to an average loss. I think, therefore," says Judge Story, "that it may be assumed as a position not now controverted, that the existence of the ship does not prevent the loss from being considered total to the owner." In the case of *Adams v. McKenzie*, in the Common Pleas, 7 L. T. Reps., N. S., 711, 13 C. B., N. S., 442, where the ship was insured against total loss only, there was a constructive total loss with a notice of abandonment; this was held to amount substantially to a total loss, though the ship was ultimately repaired and sold. "If the parties intended," said Williams, J., "only to insure against the absolute and total physical destruction of the ship, they should have expressed themselves in different language." See also 6 Moore's P. C. C., N. S., 304. This point, therefore, may be considered as settled.

The next objection was to the form of abandonment, which for that reason I have set out at large. The rule was cited from 2 *Parsons on Insurance*, 172, that an abandonment should state substantially the grounds on which it is made, and the cause stated must be a peril within the policy. In *Peirce v. Ocean Insurance Co.*, 18 Pick., 83, it was stated that the vessel had been damaged, condemned and sold, but

the abandonment was held to be insufficient, *Shaw*, C. J., saying: "It has already been mentioned as a requisite to a good abandonment, that it must state the reasons and grounds upon which a total loss is claimed." So held also by *Curtis*, J., in a case where the vessel was stated to have been condemned. Some exceptions, however, to the rule, are mentioned in the note to *Parsons*, and we have never acted on it in this Court. Where the facts are known or may be ascertained by correspondence or telegrams, so strict a rule would be a sacrifice of substance to form. It is contrary, too, to the spirit of *English* decisions. Some of these I reviewed in my judgment in *Morton v. Patillo*, already referred to, from which it appeared that no special form of abandonment was prescribed by law or usage, and that it might even be verbal. I have since fallen in with the case of *Currie v. Bombay Native Insurance Company*, on appeal to the Privy Council, 22 L. T. R., N. S., 317, where the appellants wrote to the underwriters, stating that the ship was a total wreck, and giving notice that they should claim payment of the policies. The Recorder of *Rangoon* had held the notice insufficient, but was overruled by their lordships. "The case," said Lord *Chelmsford*, "upon which the Recorder founded his judgment was the *Nisi Prius* case of *Parmeter v. Todhunter*, 1 Camp., 341, in which Lord *Ellenborough* held that the abandonment must be express and direct, and thought the word 'abandon' must be used to render it effectual. But whatever strictness of construction might have been applied to notices of abandonment in former times, it never could have been absolutely necessary to use the technical word 'abandon,'—any equivalent expressions which informed the underwriters that it was the intention of the insured to give up to them the property insured upon the ground of its having been totally lost must always have been sufficient." Upon this rational rule, the notice in the case in hand cannot, I think, be assailed.

And this brings us to one of the main questions, the right of the plaintiffs to abandon the ship as she lay after the survey or condemnation of 14th *March*. It is in proof that the ship shortly after was got off, and it is an unavoidable inference, too, that she was repaired so as to be accounted seaworthy, and to be navigable for several years, up to 1871 at

all events, at a cost less than her value when repaired. The exact cost we have no means of computing, but it was less than her value,—it would not have much exceeded half her value when completed. Did a probable loss, then, founded on the judgment of competent surveyors, and on the *bona fide* opinion, as we must assume, of the insured, justify an abandonment and sale of the vessel, and impose a liability as for a total loss on the defendant?

Before examining this very important and very difficult point, we must call to mind a material difference between the *English* and *American* rule, the latter permitting an abandonment where the cost of repair would exceed half the value, and being, therefore, much more favorable to the assured. Keeping this in view let us again turn to the case of *Peirce v. Merchants' Insurance Co.* 'The right of abandonment," said Judge Story (fol. 61), "must depend upon the facts and the judgment upon these facts, at the time when it is made. If the facts then present a case of extreme hazard and of probable expenses exceeding half the value of the ship, the party may abandon, although in the event it turn out that the ship is gotten off at a less expense." And he cites *Fontaine v. Phoenix Insurance Co.*, 11 Johns. R., 293, and *Anderson v. Wallis*, 2 Maule & Selwyn, 240-248. An absolute total loss is not necessary to justify an abandonment. It is sufficient, if at the time it be in the highest degree probable to sound judgment acting upon all the facts. In the forcible language of Lord *Ellenborough* in the case of *Anderson v. Wallis*, an abandonment is never to be authorized, except when at the time the loss was actually total or in the highest degree probable; and if we analyze the cases that settle the law that now prevails in *England*, we shall find that it is this principle that runs through, explains and justifies them all. I shall cite also on this head a case from 16 *Illinois Reps.*, 235, which I find in the case of the *Baton* from *Missouri*, reported in 24 *L. T. Reps.*, N. S., 44, where the Court, after a very free discussion of the subject, held that the right to abandon must be determined by the judgment of experts applied to the condition of the vessel at the time of abandonment; and although the cost of saving and repairing the vessel after abandonment may be less than 50 per cent., yet

if the facts at the time apparently justified the abandonment, it will be good. It was objected at the argument of the case in hand that the total loss was created by opinion and falsified by fact, but if the principles just stated be sound, the judgment of experts—an honest *bona fide* opinion credited by a jury—will sustain an abandonment and convert a partial into a total loss.

One of the main issues put to the jury in this case, and which we must infer from the verdict to have been found for the plaintiffs, was the acceptance of the abandonment by the acts of the underwriters in purchasing and repairing the ship. Looking to the well established rules on this point, (2 *Parsons on Insurance*, 177; 3 *Mason*, 81, &c.,) there can be no question that with a policy in the usual form, the acts in proof were abundantly sufficient to charge the defendants with an acceptance, and, therefore, with a total loss. Their sole answer is the clause already cited from this policy, which comes for the first time before us, with the lights to be drawn only from the *American law*. The cases are in the note to 2 *Parsons on Insurance*, 142, going as far back as the year 1838. In the *Commonwealth Insurance Co. v. Chase*, 20 Pick., 142, where the policy contained this clause, the Court said the legal construction must be according to this express provision. "We think that this right on the part of the underwriter to act for the preservation of the property insured is one of great importance. It works well for the cause of truth and justice. It proceeds upon the principle of indemnity, on which the law of insurance rests." Judge Story's celebrated decision in *Peirce's* case had run counter to the right of underwriters to repair after abandonment, which the Supreme Court of *Massachusetts* had recognized, and the clause in question was inserted in the *Boston* policies to restore and to secure that right. Both in its general and its special aspects it is reviewed in the case of *Reynolds v. Ocean*, 22 Pick., 191, 1 Met., 160, in which the Justice Shaw is significant. He defines and limits within reasonable bounds. The later decision in *Parsons*, but so far as we can see it in the decisions, the full effect of the clause is not according to Curtis, J., the claim can have no

reference to any other repairs than such as may be needful for the temporary preservation of the property and its relief from perils within the policy, whereas more ample and complete repairs appear to other interpreters to have been contemplated. However this may be, all are agreed that after the repairs the ship must be restored or tendered back to the assured within a reasonable time. "If the vessel," said the Court, "was not got off repaired (that is fully repaired) and ready, and offered to be restored within a reasonable time, after the underwriters had taken possession of her for that purpose, they must be considered as having made her their own, and accepted the abandonment, and would then be liable as for a total loss." "Taking possession of the vessel for another and distinct purpose is not within the provision in this policy." Upon these principles the fact of the underwriters in this case having omitted to restore or tender the vessel to the assured, and having sailed her as their own, is decisive of their liability. Had they so restored her and been able to show that the loss was partial only in its character, they might have recovered the outlay from the assured, as in 20 *Pick.*, 142, already cited. This case of *Commonwealth Insurance Co. v. Chase*, is very remarkable, and in the absence of any *English* authority or clauses which are *American* in their origin, it should be studied as a guide. The policy, besides the "*Boston* clause," contained two others peculiar to itself, and which none of our offices, so far as my experience goes, have adopted. By the first, it was provided that the insurers should not be liable for any general average or partial loss on the vessel, unless the sum of such loss, which the insurers would be obliged to pay under an adjustment as of a partial loss, should amount to 50 per cent. And by the second, that the assured should not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay, under the adjustment as of a partial loss, should exceed half of the amount insured. The vessel was insured in \$4000 valued at \$6000. She got ashore with the loss of both masts, cables and anchors, &c., and an abandonment was made but not accepted. The insurers, under the "*Boston* clause," then employed an agent, who took measures to save the property,

and in forty-eight hours he got the vessel off the beach, recovered her cables and anchors, and towed her into an adjoining port, where she was overhauled and repaired at an expense of less than \$1300, including \$700 for getting her off the beach. The repairs were well made. The agent's charges and expenses were \$293.75. The vessel was navigated to *Boston* by the former master and crew, under a new engagement made with the agent of the insurers, and on her arrival the plaintiffs brought suit against the owners for their whole outlay, \$1626, and attached the vessel therefor, which was afterwards given up to the defendants on bond, pursuant to the statute. The question then arose, whether the defendants were liable for expenses incurred without their consent and against their will, having made no promise express or implied to pay them, and the expenses made for the relief and benefit of the insurers. The opinion of the Court delivered by Judge *Putnam*, from which I have already quoted a passage, is worth the studying as a whole, and I regret that we have none of the *Massachusetts* reports since those of 1840, which might have thrown further light upon it. The Court held the defendants liable, the plaintiffs having done for their benefit what they were bound to have done themselves, and the plaintiffs being protected by their contract from all losses less than 50 per cent.

In the *Yarmouth* policy the insurers are protected from all partial losses whatever, and on restoring the vessel, therefore, would have been entitled, as I think, to recover the whole amount of their outlay.

There is another point in this case to which I wish to advert before I close, and that is, the difference between the *English* and *American* law as to the time to which the right of abandonment refers. There is a decision of Chief Justice *Parsons* in *Wood v. Lincoln Insurance Company*, 6 Mass., 479, of which it is said by Justice *Putnam*, 20 Pick., 140, that it embodies in five or six pages as much law touching the subject of insurance, as is sometimes spread over as many volumes. The opinion thus eulogized opens with this paragraph, which I take to be sound *American*,—but not *English* and therefore not *Dominion* law: "If the plaintiff, when he made the offer to abandon, had a legal right to abandon, the

verdict for him must stand, notwithstanding the subsequent recovery and arrival of the vessel. The right to abandon is a vested right, and when legally exercised, the assured is entitled to recover as for a total loss, which subsequent events cannot prevent, unless with his consent manifested expressly, or by reasonable implication, from his subsequent conduct." The rule in the *English* Courts, as pointed out by *Story*, J., (3 Mason, 37,) and by *Blackburn*, J., in *Kemp v. Hulliday*, (13 L. T. Reps., N. S., 262,) is very different. There it is held that, if an abandonment be rightfully made, it is not absolute, but may be controlled by subsequent events, so that if the loss has ceased to be total at any time before action brought, the abandonment becomes inoperative. The *American* Courts have some doubts of the equity of their own rule. Judge *Story* prefers it to the *English*. My own judgment, I must confess, leans the other way. In the present case it might have been very material, as the action was not brought, I see, until *March*, 1868.

The rule for a new trial, as we all think, must be discharged with costs.

SMITH v. MCLEAN ET AL.

In 1844 *Alexander*, the father of *Hugh* and *Archibald*, conveyed certain premises to *Hugh* upon the consideration of a bond for his maintenance given by *Hugh*. All three continued to live upon and work the premises together. In January, 1863, the plaintiff issued a writ against *Hugh* which ripened into a judgment in October, 1864. In June, 1864, *Hugh* conveyed to *Archibald*, the consideration being stated at the trial to be a verbal agreement that *Archibald* should assume the burden of maintaining the father, as *Hugh* wished to go away. In 1866, plaintiff obtained a judgment against *Alexander*, the father, and in 1860 executions were issued upon both judgments, the lands were levied upon by the sheriff, and sold thereunder, and a deed executed by him to the plaintiff, who thereupon brought an action of ejectment against the father and two sons, and verdict was found for the defendants. Upon rule nisi for a new trial;

Held, that *Hugh's* title, whatever it might have been worth at its inception, had become valid in 1866, the time of the plaintiff's judgment against the father, but the conveyance from *Hugh* to *Archibald* having been executed subsequent to the service of plaintiff's writ upon the former, and while the action was pending, and not being supported by any valuable consideration must be deemed to be a fraud on *Hugh's* creditors, and void under 13 *Elizabeth*, ch. 5, and that therefore the rule nisi should be made absolute.

McCULLY, J., now, (December 3rd, 1872,) delivered judgment as follows:—

This cause was tried before Mr. Justice *Dodd* at *Port Hood*, October, 1871, and a verdict found for defendants, *Alexander*

having withdrawn his plea by consent. It was an action founded upon a sheriff's deed made under chap. 115, *Revised Statutes*, which with the statute 13 *Elizabeth*, chap. 5, are both before the Court for consideration and construction. The first clause of chap. 115, *Revised Statutes*, enacts that judgments recovered in the Supreme Court shall bind the real estate of the debtor from the time such judgments shall be recorded in the books of the registry for the county or district wherein such real estate is situated, but no lands shall be levied upon until one year after such registry. The second clause is as follows: "The interest of the party beneficially interested in lands held in trust for him may be taken in execution for the payment of his debts in the same manner as if he were seized or possessed of such lands." The intervening clauses to the 10th are directory for the most part. The 10th clause is as follows: "The sheriff shall deliver to the purchaser a deed of such land (that is after compliance with the directions of the statute and a sale), which shall be sufficient to convey to the purchaser all the interest of the defendant in the land therein described, subject to prior incumbrances. By the 11th clause the sheriff's deed shall be presumptive evidence of the defendant's title having been thereby conveyed to the purchaser. A deed was put in by plaintiff executed by the sheriff of *Inverness*, made to plaintiff, dated 18th of *September*, 1869, and recorded the 20th of the same month. This deed recites that in pursuance of certain writs of execution issued out of the Supreme Court, at or on, &c., against *Hugh McLean*, at the suit of the plaintiff, for the sum of \$211.39 due on said execution, and against *Alex. McLean*, at the suit of plaintiff, for the sum of \$700.82, amount due on said execution, he, the sheriff, did extend and take in execution a certain tract of land, being the premises described in plaintiff's writ; the usual recitals of the equity of redemption having expired, notice of sale as by law required, sale on the 18th *September*, and to plaintiff for \$200 follow, and then words of conveyance apt for the purpose in the issued form constitute the conclusion. The evidence goes on to show that *Alexander* was the father, and the two sons *Hugh* and *Archibald*, co-defendants, reside on the lands, *Alexander's* possession extending over forty years. The abutments were proven. This was plaintiff's case.

A deed from *Hugh McLean* to *Archibald McLean*, one of the defendants, dated 5th of *June*, 1864, of same premises, put in by defendants and read. A deed from *Alex. McLean*, the father, to *Hugh* his son, dated 12th of *August*, 1844, describing the premises, put in and read. A bond for maintenance on 12th *August*, 1844, *Hugh McLean* to his father, proved and read. This, it was contended on the part of defendants, was the condition of the last-mentioned deed, though not so stated therein. There was considerable verbal testimony taken down by the Judge, to portions of which I shall have occasion to refer hereafter. The plaintiff called witnesses in rebuttal, and proved the judgments upon which the execution had issued, that against *H. McLean*, *October*, 1864, for \$113.82, that against *Alexander*, *April*, 1866, \$590, and he also offered other testimony, to which I shall have occasion to refer. The plaintiff obtained a rule for a new trial on the grounds of misdirection, improper refusal, and improper reception of evidence, and verdict against law and evidence.

On the argument defendant's counsel took exception to plaintiff's deed, because it recites two executions as issued on the several judgments, the same plaintiffs in both suits but different defendants, one judgment being against *Hugh*, the other against *Alexander*. The statute is silent on this subject. No form of deed is given, but one of the defendants, *Archibald*, deriving his title from another defendant, *Alexander*, through *Hugh*, who, as well as *Alexander*, are the judgment debtors, I am not prepared to say that the sheriff could not and did not convey to plaintiff by the deed in question any title *Alexander* had as well as any title *Archibald* claiming to have under *Hugh* had, he claiming under *Alexander*. If, supposing the conveyances to fall within the provisions of 13 *Elizabeth*, chap. 5, as contended for by plaintiff's counsel, the plaintiff failed in making such a case as entitled him to succeed as against *Alexander*, the father, on the grounds of the length of time elapsing from the date of *Alexander's* deed to *Hugh* before action, say from 1844 to 1869, twenty-five years, and I think he did, yet the sheriff's deed was well enough for aught I can see to convey any title *Hugh* had 5th *June*, 1864, when he made a deed to *Archibald*, if that deed

for any cause did not operate. The sheriff advertized and sold under both executions. Defendants admit their possession by their plea, and although no precedent for such a form of deed and proceeding was furnished, as it was in diminution of expense and favorable to economy as regards costs, and no known principle of law contravened or violated that I am aware of, I hold this deed *quoad* the title of *Hugh*, if he was not legally divested of it by the deed of 1864 to *Archibald*, sufficient. In the view I take of this case, that the title made by *Alexander* the father to *Hugh* the son in 1844, whatever it was in its inception had ripened by lapse of time at the date of plaintiff's judgment against *Alexander* in 1866, say twenty-two years, I only feel required to examine the facts and the law as they apply to the deed of *Hugh* to *Archibald* on the 3th of *June*, 1864, and the writ issued by plaintiff against *Hugh* 14th *January*, 1868, which resulted in a judgment *October*, 1864, for \$113.82. If this transfer falls within the provisions of the 13 *Elizabeth*, chap. 5. it is enough for the plaintiff's purpose, and he would be entitled to recover. *Hugh*, it will be observed, obtained his title from his father so long ago as 1844, and, although under the circumstances, I think far from free of suspicion, and requiring investigation, so far as they connect themselves with the title claimed by *Archibald*, yet to that extent only. The father, *Alexander*, was then a farmer owning the premises, stocked with cattle, horses, &c. He was about 52 years of age. His version of it is that he had a broken hand, and he wanted one of his sons to remain and assist him. He was in good health, and got the bond for maintenance from *Hugh* when he gave him the deed. Assuming as I do that the title passed in 1844 to *Hugh*, and that the bond entered into was the substantial consideration, although *Hugh* contends he had advanced small sums besides, of which he kept no account, yet no separate possession was ever, it seems, taken of the premises in consequence. The father and his sons seemed to have lived thereon for some time, as they had previously done. *Hugh* was forty-nine years old at the trial in 1871, and could have not been over twenty-one or twenty-two in 1844. He says: "We made a good living off the farm. My father at times continued to work on the farm and was a good worker. I remained

home sixteen or seventeen years after the deed." This would bring the date of his leaving up to 1860 or 1861. He adds: "*Archy* did not give me a bond to support my father, but he remains on the place and is still there. He (*Archy*) paid me £5 when I got the place from my father." What this has to do with the matter does not appear.) "Afterwards he was going away and I promised him half the farm if he would remain." (This is very inexplicable to me.) Then he adds: "I then went away, and when I returned he wanted security." (What for? Had he kept the father?) Then witness adds: "I gave him all the farm upon the condition he would remain and support his father. Nothing in writing between us. The agreement was about seven years ago, that would be in 1864." Then follows this important admission: "When I gave the deed I had been sued by plaintiff." This fact appears by the dates given, and much stress was placed upon it by plaintiff's counsel. The circumstances connected with the execution of the deed from *Hugh* to *Archibald* are worthy of some notice. *Hugh Campbell*, a subscribing witness, says: "It was after dark when he (*Hugh*) came to my house to sign it. He came with defendants. *Hugh* was then living at *Pictou* and was then on his return there. Witness resided five miles from their farm. *Hugh* was a poor man at the time, and I do not know if he had any other land. *Hugh* says: "It was six or seven years after the agreement before I gave him the deed, and yet he had previously said the agreement was made about seven years ago. If made seven years it was made in 1864, which is the year the deed bears date. *Hugh* says: "I went to *Cameron's* (*Campbell*?) as the nearest justice to the deed." *Campbell* says: "There were other justices nearer to defendant than I was." *Archibald's* version of the matter is substantially this: "Four or five years after *Hugh* got the deed" (this would be in 1848 or 1849) "he, *Archibald*, was going away, and he asked *Hugh* if would give him (me?) the farm if he (I?) would stop." "No consideration is named, no object specified. *Archibald* then goes on: "He (*Hugh*) said he would give me half, and we agreed upon that. I continued to work with him for five years." Now if we add these five years to the other four or five years subsequent to 1844 it may bring the date up to 1853 or 1854. Witness

continues: "When he was then going away he told me if I would remain and take care of my father and mother and the rest of the family," (and of what it consisted does not appear) "he would give me the whole farm. I agreed to that, and shortly afterwards he went away, but returned in a year, and then gave me the deed of the property." But these dates cannot by any possibility be right, for another year added to 1854 would only bring the date 1855, whereas the deed was given in 1864. According to *Hugh's* version of the matter, before he left he had agreed to give *Archibald* half the farm to stay with the family, and on his return to give him the whole if he would promise a maintenance for his father. According to *Archibald*, he asked *Hugh* if he would give him the farm if he would stop. *Hugh* said he would give him half, and they agreed upon it, and he (*Archibald*) continued to work with him for five years. Then he adds: "When he was then going away he told me as above that if I would remain and take care of the father, mother, and the rest of the family, he would give me the whole farm." But *Hugh* says nothing about taking care of the mother and the rest of the family at all. This, therefore, is a new element of consideration, and the versions of the brothers are inconsistent with each other, both as regards dates and material facts. The plaintiff was examined, and his version of matters was more or less inconsistent with that given by defendants' witnesses. But I place no reliance on that in the view I take of the case. An objection was pressed at the argument on the part of defendants' counsel that proper notice had not been given of the sale as required by law. But on the sheriff being called, he gave testimony sufficient, in my opinion, to satisfy the requirements of the statute. In view of the discrepancies between the statements of defendants who testified as above shown, bearing in mind that the defendants are father and sons, and that *Archibald* claims through *Hugh*, the judgment debtor, who divested himself of title *de facto*, after he had been sued by plaintiff for the very debt which ripened into a judgment under which the lands were sold as *Hugh's*, and *Hugh* admits that up to this hour he has not paid plaintiff and the debt is not disputed I observe that this is one of that class of cases which if not within the provisions

of the statute of *Elizabeth*, at first blush comes so perilously near that it well deserves the most careful and searching consideration.

The jury having passed upon the facts as they were detailed to them and found a verdict for defendants, it becomes the duties of the Court here carefully to review the law as it was expounded to them in its application to this case by the learned Judge. His lordship Mr. Justice *Dodd* reports his charge as follows: "I informed the jury that these conveyances from father to son, and from one brother to the other, were sufficient to pass the lands in dispute, and were good and valid as between the parties to them; but if given in fraud of creditors, in that case they were void in law, but the proof of fraud was upon the party charging it. and this had been attempted by plaintiff in answer to defendants' case." All this was quite right, quite correct; but was it sufficient, and was this far enough? Without the statute of 13 *Eliz.*, chap. 5, at common law, this language would have been correct and appropriate. But the statute of *Elizabeth*, I apprehend, goes much further than this, and I respectfully remark that the jury's attention should have been called more particularly to its provisions, and some of the many, and, especially, the modern decisions thereon. In a very late case, *Kent v. Riley*, decided July 20th, 1872, (vol. 20, *W. Reps.*, p. 853, Chancery.) Lord *Romilly*, M. R., says: "This is a suit to set aside a deed on the ground that it was executed for the purpose of defeating creditors. I think the result of the case is exactly what is laid down by the Lord Chancellor and Lords Justices in *Freeman v. Pope*, 18 W. R., 906, L. R., 5 Chan., 538, that the real question in every case of this sort is whether the deed was executed for the purpose of defeating creditors or not. It is justly observed that it is impossible to penetrate into a man's mind and discover all his purposes. The facts, however, can be looked to to see what inference can be drawn from them." Applying this learning to the present case, the question for the jury was this: Admitting that *Hugh* was indebted to plaintiff in 1866 when he gave the deed to *Archibald*, when he had actually been served with a writ at plaintiff's suit, did he make the deed to *Archibald* in order to defeat or delay the plaintiff's claim? That

the conveyance has had that effect, up to the present there is no room for doubt. Should not the jury have been directed thus, and told that if they were of opinion that such were *Hugh's* intentions at the time he gave the deed, then their verdict should be for plaintiff?

Again, I think the jury in this case should have been told that in order to sustain the deed from *Hugh* to *Archibald* they must be satisfied that it was not merely given for a good consideration, but also *bona fide*. "It is not sufficient," says *Story*, in his *Eq. Jurisprudence*, sec. 323, "that it be upon good consideration or *bona fide*; it must be both. Therefore if a conveyance or gift be defective in either particular, although it is valid between the parties and their representatives, it is utterly void as to creditors, and for this he cites *Bacon's Abrid. Fraud*. See also *Shaw v. Bran*, 1 Star, 319; *Morewood v. Wilkes*, 6 C. & P., 144; *Perkins v. Bradley*, 1 Hare, 219.

The case of *Gale v. Williamson*, 8 M. & W., 405, has some features in common with the present. There the father by deed assigned to his son, in consideration of natural love and affection, his dwelling-house and all his personal estate. Held, in an action by the son against the sheriff for levying on goods part of such estate under a *fi fa* against the father, that it was competent to the son to prove that by a bond bearing even date with the bond of assignment, he bound himself to maintain his father, wife and children; and there the jury having found that it was part of the same transaction, and that the assignment was *bona fide*, it was not void against creditors under 13 *Eliz.*, chap. 5." Should not this case, therefore, have been put to the jury so as to have directed their attention to the real point, viz., was the verbal agreement entered into between the brothers for the maintenance of the father as *Hugh* says, for the father, mother and family as *Archibald* testifies, the consideration of the deed made long after the agreement and after *Hugh* had been served with process? been so put, and the jury had found that it was still . . . would have differed from that of *Gale v. William-* . . . that there there was a bond for maintenance, &c., . . . y the jury, while, here, there was nothing but a . . . ment between the brothers. There the jury found

that it was part of the same transaction. Here their attention was not directed to that important inquiry.

There is still another and most important feature in the case to which, I think, the attention of the jury should have been directed. Suppose that there was a valuable consideration for the deed from *Hugh* to *Archibald*, whether it consisted of work and labour on the farm, or money advanced, or the maintenance of the father, or of the father and family, or any, or all these together, yet if *Hugh*, being served with process, with intent to delay or defeat his creditors, made the deed, it was void as against them, under 13th *Elizabeth*, ch. 5. And for this *Holmes v. Penney*, 3 Kay & Johns, 90, is a direct authority. *Barling v. Bishopp*, 29 Beav., 417, is a strong case. After notice of trial in an action of trespass the defendant executed a voluntary conveyance of real estate to his daughter. The verdict went against him and he afterwards took the benefit of the *Insolvent Debtor's Act*. Held, that the conveyance was void under 13 *Elizabeth*, ch. 5, it being intended to defeat the plaintiff in the action.

His Lordship told the jury that "the deed from *Hugh* to *Archibald* had been made when both parties to it had known that the plaintiff had commenced an action against *Hugh* for debt, in which he finally succeeded in obtaining a judgment, and that the transfer, under these circumstances, was a badge of fraud," (and so it was at common law), "but not by any means conclusive," &c., and, in conclusion, added to what he had said previously, that "the proof of fraud was upon the party charging it." He concluded by informing the jury that he thought the plaintiff had failed in proving fraud. It seems to me that was not exactly the point in the case. The intent in this class of cases is of the essence of the inquiry. In *Henderson v. Lloyd*, 3 F. & F., 7, it was laid down by *Erle*, J., that under the statute of 13 *Eliz.*, c. 5, it is for the jury on all the facts to say what was the intent with which the deed was executed. *Bott v. Smith*, 21 Beav., 511, shows that where there is an intention to defeat or delay creditors the deed will be void though for valuable consideration. The case of *Spirett v. Willows*, 3 DeG., Jones & Smith, 293, Fisher's Dig., 943, bears upon this case, assuming the assignment to be voluntary, and whether it was or not

does not seem to have been put to, or found by the jury. All they were directed to find was, I think, a mere common law issue. Was it or was it not a fraudulent conveyance? And they were told by the learned Judge that the *onus* of proving it such lay on plaintiff, and he thought plaintiff had failed in proving fraud. Now the debt to plaintiff had been contracted before the date of the deed, therefore whether the conveyance to *Archibald* caused insolvency or not, according to *Spirett v. Willows* is not material. And there it was held that, if after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts, but was reduced to a state of insolvency, then the law infers that the settlement was made with intent to delay, hinder or defraud creditors, and is therefore fraudulent and void.

It was contended by plaintiff's counsel on the argument that it was not competent to defendant to set up any consideration for the deed except what was shown upon the face. But *Gale v. Williamson*, cited above, and *Townend v. Toker*, L. R., 1 Chan., 446, are authorities to the contrary, and the jury might have been required to pass upon the subject as to whether the maintenance spoken of was in whole or in part the consideration of the deed *Hugh* to *Archibald*.

On the part of plaintiff it was contended on the argument that unless the verbal agreement for maintenance constituted a consideration for the deed, there was none whatever. That in any case to be a valid contract in law it must be mutual and such as could be enforced. Then, it was asked, could *Hugh* have compelled *Archibald* to maintain his father, &c., under any version given by the witnesses or either of them, or have received damages in case of refusal. Upon this branch of the case *Hulse v. Hulse*, 17 C. B., 711, was cited. There A, having performed gratuitously services for B, received from him a promissory note with an understanding that he would accept it not only as a gift for what was past but that it should be remuneration for future services to be rendered as long as B should require them. A continued to perform the services until B's death when he sued B's executors upon the note. Held, that as there was no contract binding A to perform future services, there was no considera-

tion. What contract was there binding on *Archibald* to maintain father or family if he repudiated the supposed obligation? But the case having the most direct bearing is *Freeman v. Pope*, cited from L. R., 5 Ch. App. cases, p. 540. I have already said that the intent is of the essence of the enquiry in a case like the present. There Lord *Hatherly*, and so lately as 1870, is reported as saying: "The principle upon which the statute 13 *Eliz.*, ch. 5, proceeds is that persons must be just before they are generous." He adds: "The difficulty the Vice-Chancellor seems to have felt in this case was that if he, as a special jurymen, had been asked whether there was actually any intention on the part of the settlor in this case to defeat, hinder, or delay his creditors, he should have come to the conclusion that he had no such intention." Lord *Hatherly* adds: "With great deference to the view of the Vice-Chancellor and with all the respect I unfeignedly entertain for his judgment, it appears to me that this does not put the question exactly on the right ground. For it would never be left to a special jury to find *simpliciter* whether the settlor intended to defeat, hinder, or delay his creditors, with a direction from the Judge that if the necessary effect of the instrument was to defeat, hinder, or delay his creditors, that necessary effect was to be considered as evidencing an intention to do so." He says: "A jury would undoubtedly be so directed, lest they should fall into the error of speculating as to what was actually passing in the mind of the settlor, which can hardly ever be satisfactorily ascertained, instead of judging of his intention by the necessary consequences of his act, which consequences can always be estimated from the facts of the case." "Of course, there may be cases like *Spirett v. Willows*," said his Lordship, "in which there is direct and positive evidence of an intention to defraud independently of the consequences which may have followed." And further on he says: "But it is established by the authorities that, in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of these debts, an amount without which the debts cannot be paid then since it is the necessary consequence of the settlement, supposing it effectual that some creditor must

remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute. This having now become a leading case and recognized in the *English* Courts, I have extracted largely from the judgment, because it seems to go further than any previously decided case in this that not only recognizes the doctrine of intent to defeat and delay creditors as the touchstone, but it pronounces that the intention is to be ascertained by the necessary consequences of the act, and that a jury should be so directed.

Crossby v. Elworthy, 12 L. R. Eq. Cases, 158, May, 1871, was cited to show that the burthen of proof was on the defendant *Archibald* (claiming under *Hugh*) to show solvency at the date of the deed. There when a party made a voluntary settlement, and nine months afterwards laid a statement before his creditors showing himself insolvent, the Court held that the burthen of proof to show solvency at the date of the settlement was upon him. *Cornish v. Clark*, argued March 18th, 19th, and April 17th, 1872, reported August 3rd. See *W. Reps.*, vol. 20, p. 897, heard and decided by Lord Romilly, M. R., in Chancery, is a case very like this. *Cornish v. Clark* was a creditor's suit in equity. This is a creditor's suit, and the statute cited, chap. 113, sec. 2, entitles the judgment creditor to seize and sell defendant's equity, if any, or other beneficial interest in lands. Defendant *Clark* owed plaintiff £300 in the end of 1867. His other debts trifling. His property consisted of three threshing machines, value £100 to £200 each; £300 in a bank; £200 lent on a note of hand; £350 on mortgage, and about £16 of household furniture, 13th June, 1868. Then 65 years of age and failing in health, he gave a threshing machine to each of his sons, and they each by their several memorandums of that date agreed to pay him in consideration of the gift an amount of £20 a year during life. 7th November, 1864, he drew the £300 out of the bank and gave it in £50 sums to each of his six daughters. The £350 mortgage was assigned to trustees to pay the interest to him during life, and after his death to be divided up among his six daughters and the children of a deceased daughter. In April, 1869, plaintiff sued, and on the 13th recovered judg-

ment for £374, debt and costs. *Clark* himself died in *January*, 1870. The defence was that the machines were given in consideration of the annuities, which were an adequate consideration, having regard to *Clark's* health, and in that case the M. R. decided that the acts of a settlor, whereby his creditors are delayed, hindered or defrauded are equally obnoxious to the provisions of 13 *Eliz*, chap. 5, whether they proceed from himself alone or are instigated by others. Therefore, where a man, at the instigation of his children, distributed his property among them in a manner which was fair and equitable as far as they were concerned, but did not provide for the claims of creditors.* Held that the transaction was void under 13 *Eliz.*, chap. 5, and that the statute applies to pecuniary gifts as well as to voluntary conveyances. In this case the defence as to part was that the property was given in consideration of annuities which were an adequate consideration, and Lord *Romilly*, assuming that he (the father) had not the primary intention of defeating his creditors, still the children who took advantage of his state to effect that object cannot profit by it. Again, "I am of opinion," says his lordship, "that the statute of *Elizabeth* was passed to meet and counteract this particular evil, by which the property of the debtor is removed out of the reach of the creditors. Again, I think it is of no moment whether the parting with the property is by voluntary settlement or by gift, whether it is in anticipation of death or bankruptcy, whether it is by the free will of the donor or at the instance of the donees. I think also that the consideration of the annuities of £20 does not render the transaction valid. No doubt," says he, "in such a case, whether mentioned or not, the children would support their parent." And see *McKay v. Douglas*, L. R., 14 Eq. Cases, 106, *May*, 1872, where A, on the eve of entering into a partnership, made a voluntary settlement of the bulk of his property. The firm shortly after became bankrupt. Held that the settlement, though A was not indebted at the time of making it, was null and void as against creditors. *Malins*, V. C., without calling for a reply, remarked that the suit raised as important a question as ever was before the Court on this branch of the law.

On various grounds, in the light of modern decisions on this settlement, I am of opinion that the rule *nisi* should be made absolute, and this case remitted to a new jury.

IN RE ASSESSMENT SCHOOL RATE, SECTION 42,
ANTIGONISH.

WHERE every material fact in the affidavit upon which a *certiorari* was founded was negatived in the affidavit of the other side,

Held, that the *certiorari* must be quashed.

Where the grounds of an appeal from an assessment are simply matters of detail the appeal should be primarily to the Court of Sessions and not to the Supreme Court.

The Court of Sessions has power to set aside a whole assessment where it manifestly appears that it has been irregularly and therefore illegally made.

RITCHIE, J., now, (December 3rd, 1872,) delivered the judgment of the Court:—

We think the rule to quash the *certiorari* in this case should be made absolute, as having unprovidently issued, every material fact in the affidavit on which it was grounded having been negatived in the affidavit on the other side.

It was contended at the argument that no *certiorari* could be taken out until after an appeal to the Sessions in accordance with the provisions of the *County Assessment Act*, under which school rates are directed to be collected. That act provides that any person aggrieved by the assessment, or the levy, may appeal to the Sessions on an affidavit setting forth the grounds thereof, and the court of appeal, without prejudice to the whole or any part of the assessment, may either set aside or lower the rate on such person, or finally determine the appeal as shall be seen fit; and the School Act provides that the trustees shall return the assessment to the Sessions where appeals shall be heard and determined.

By the 67th section of the *Assessment Act* no *certiorari* to remove rates or orders or other proceedings of the Sessions touching rates shall be granted, but upon motion in the first week of the next term in the county, after the time of appeal has expired, and before its being made to appear by affidavit that the merits of the question will by such removal come

properly in judgment, and no rates or orders shall be quashed for matter of form only, nor any general rate for any illegality in the rates of individuals, except as to such individuals.

Without taking away from the Supreme Court the right of reviewing the proceedings of the parties making the school rate, or those of the Sessions on an appeal to them, the Legislature contemplated that in ordinary cases the appeal in the first instance should be to the Sessions, and the case before us is one which that Court could well have dealt with, as the questions raised by the parties objecting to the rate involved for the most part matters of detail, such as the regularity of the calling of meetings, the appointment of a secretary, whether certain persons were or were not resident within the section, and whether certain other provisions of the School Act had or had not been complied with by the trustees, &c., all of which could very perfectly be investigated by that tribunal, and under such circumstances the parties dissatisfied with the rate should not pass by the appeal given them by the statute and resort to this Court by removing the proceedings to it by *certiorari*.

It was urged before us at the argument that the Court of Sessions has no right to set aside the whole assessment, but we think that if on an appeal by any party complaining of the assessment it were made to appear that the rate was irregularly, and, therefore, illegally made, that court would have the power of so declaring, and give the relief sought.

In *Parker v. Bristol & Exeter Railway Co.*, 6 Exch., 184, it was contended that the power of appeal having been given in certain cases, it was intended that the power of removal by *certiorari* should be abolished, but the Court held that the two were not necessarily inconsistent, and as that case did not involve matters of law, but consisted of matters of detail, the question would be properly raised on an appeal to the inferior tribunal.

But the grounds on which the *certiorari* issued in the case before us having entirely failed, the rule for quashing the writ should on that ground be made absolute with costs.

THE QUEEN v. MARTIN.

THE prisoner having picked up certain goods that had floated away from the wreck of a steamer appropriated them to his own use. He was indicted for larceny, the property in the goods being laid in the captain of the steamer, but at the trial the Judge instructed the jury that they could not convict him of larceny. The prosecution then claimed a conviction for a misdemeanor, and the jury found accordingly. On a case being reserved for the full Court,

Held, WILKINS, J., dissentiente, that under section 110 of the *Larceny Act*, 32 & 33 Vic., chap. 21, sec. 3, that the conviction must be sustained, and that although the offence was probably committed at sea, the Court had full jurisdiction in the premises.

SIR W. YOUNG, C.J., now, (December 30th, 1872,) delivered the judgment of the Court:—

The indictment charges the prisoner with larceny in four counts, the third one laying the property in *James Laird* the master of the *Ducian*, and it is the received law (*Roscoe's Criminal Law*, 6th ed., 604,) that carriers as bailees of goods have such a possession as to render an indictment laying the property in them good. On the facts so far as they are disclosed in the case I would have been strongly inclined to hold the defendant guilty of larceny. The cases collected in *Roscoe* and *Archibald* favour, I think, that conclusion. The original intent might have been lawful, but the moment the defendant in place of delivering the property found afloat to the master or agents of the ship claiming as a salvor, appropriated half of it to his own use, dividing the other half among the other salvors, who thus became his accomplices, he and they committed an offence for which they are amenable to the law. Under the *Larceny Act*, 32 & 33 Vic., chap. 21, sec. 3, borrowed from the Imperial act, 24 & 25 Vic., chap. 96, sec. 3, every fraudulent appropriation of property by a bailee is a larceny. In the case of *May v. Green*, 7 M. & W., 623, one of the counsel asked in the course of the argument, if the original possession is lawful, when is the felony committed? *Parke, B.*, interrupting him said, "Why suppose a person finds a cheque in the street, and in the first instance takes it up merely to see what it is, if afterwards he cashes it and appropriates the money to his own use, that is a felony, though he is a mere finder till he looks at it." The learned Judge in the present instance, however, took the more fashionable view, and told the jury that they could not convict of larceny, in which the jury and the Attorney-

General acquiesced, and although a formal verdict of acquittal on the several counts of the indictment does not appear to have been taken as required by the *Larceny Act*, sec. 99, the case sufficiently shows the opinion of the jury that the defendant was not guilty of the offence charged in the indictment. The Attorney-General then invoked the aid of section 110, and the jury being of opinion that the defendant was guilty of an offence against that section they found accordingly. Whether there was evidence to justify that finding is really not the question. The point reserved by this case is the jurisdiction or power of the Court to give judgment on such a conviction for a misdemeanor. It was urged on us as an anomaly to convict and punish a man for an offence created by section 110, of which there is no precedent in the Imperial act, and for which he has not been indicted. The answer is that the section does authorize such a conviction, and directs that the party so convicted shall be punished as if he had been convicted thereunder, on an indictment which must have been an indictment for a misdemeanor. With the justice or expediency of such an enactment we have really nothing to do, but if we had I think it could be easily vindicated, and in this case I think, too, it was righteously applied, and may act as a wholesome check upon the pillage or plunder of wrecked goods. It was lastly urged that the Court had no jurisdiction. Not a word was said of this at the trial. If there had the facts would have doubtless been set out in the case and the point reserved. The defendant's counsel assumed at the argument that the offence was committed and perfected at sea, but this may not have been the case, and the final appropriation and division of the spoil was more probably effected on shore. But supposing it to have been done on board the defendant's vessel at sea, it by no means follows that he is to be released. Section 136 of the *Procedure Act* of 1869, chap 29, is confined, it is true, to felonies, but the Imperial act, 18 & 19 *Vic.*, chap. 21, sec. 91, gives jurisdiction to any court of justice in Her Majesty's dominions over any *British* subject charged with any crime or offence on board any *British* ship on the high seas, or in any foreign port or harbor. The more recent act, 30 & 31 *Vic.*, chap. 24, sec. 4, shows the disposition of the Imperial Parliament to extend still further the jurisdiction of

such courts, and therefore I am of opinion that the power of this Court to give judgment on the defendant's conviction for a misdemeanor cannot be successfully assailed.

WILKINS, J., *dissentiente*.—The learned Judge who presided at the trial of this cause reserved a certain question of law which arose at the trial, for the consideration of this Court, under sections 99 and 100 of chap. 171 of the *Revised Statutes*, the provisions of which are as regards the authority of a Judge to refer, and the powers and duties of the court to which he refers, identical with those that govern the Court of Criminal Appeal in *England* (11 & 12 Vic., ch. 78). Decisions, therefore, of the last-mentioned Court are binding upon us. The authorities show that that Court has ever considered with the utmost strictness a case submitted under the statute, so much so, indeed, that it has rarely exercised the power given to it (which, by the way, the Legislature has not conferred on us,) to cause a case to be sent back to be re-stated. *Roscoe* says: "With respect to the practice of the Court, cases reserved should be submitted in a complete form, and the Court will generally refuse to send back a case for amendment." *R. v. Halloway*, 1 C. & P., 128. The same learned author says farther: "They will not consider an objection which has not been reserved, even though it be fairly deducible from the case itself, nor will they go into any matter of evidence which occurred at the trial if it is not stated in the case." *Rex v. Smith*, 14 Jur., 92. There a prisoner had pleaded guilty, and a case was reserved as to whether the act described in the depositions corresponded with the indictment; it was held that as there was no trial this was not a point of law arising upon a trial and that the Court had therefore no jurisdiction." *The Queen v. Clerk*, 1 L. R. C. C., 54. In *Reg. v. Mellor*, Dears & B. C. C., 468, the prisoner was found guilty of murder and sentenced to death; the following day it was discovered that *J. H. T.* had been called as one of the jury to try the case, but that *W. T.* had by mistake answered to that name and had been sworn by it. WIGHTMAN, J., respited execution and reserved the point for the consideration of the Court. Seven Judges out of fourteen who were present held that this was not a question arising at the

trial over which the Court had jurisdiction. I advert to these decisions as admonitory to me of the spirit in which I am bound to consider a case submitted to this Court under the statute in question. They remind me also that I am as a Judge dealing with the case of a prisoner who if guilty will be punished as if he had committed larceny, who on the other hand is entitled to be discharged if it be even doubtful in view of the facts reported, whether he is guilty of that offence for which he has been convicted. To what extent the *English* Court of Criminal Appeal, even in these days of enlightenment and high civilization, feels itself bound to rescue a convict (though apparently guilty) from a conviction not strictly legal, is illustrated by a recent case,—*Reg. v. Frost*, Dear's C. C., 474. There the prisoners were charged with having by night in pursuit of game, entered the lands of *George William Frederick Charles Duke of Cambridge*. On the trial it was proved that *George William* were two of the Duke's christian names, and that he had others, but no proof was given what they were. The jury, satisfied of the identity of the Duke, convicted the prisoners. On a case reserved the Court of Criminal Appeal quashed the conviction, the Court decided that it might have been found that the person named in the indictment was a person who had the title "*Duke of Cambridge*," omitting all the christian names. But the Court of Criminal Appeal did not venture to hold that such had been in effect the finding. I am the more scrupulous about what I conceive to be my duty in this case, when I reflect that the offence of which the prisoner has been convicted is without precedent, so far as I am aware, in *British, Dominion*, or colonial legislation. The learned Judge reported to us that the prisoner was put upon his trial for larceny under the indictment which is before us. The learned Judge says: "Under this indictment I thought the prisoner could not upon this testimony (the testimony reported) be convicted of larceny. There was no allegation of property in any person in either the first or second counts. Though the property was laid in one in *Laird*, in the other in *De Wolf*, yet, at the time the prisoner took possession of the goods they were floating on the high seas, and prisoner as a salvor, I thought, committed no larceny in taking possession of them,

and so I told the jury. But under the 110th clause of the *Dominion Act*, chap. 21, the Attorney-General claimed the right of conviction for a misdemeanor. I directed the jury if they believed the witnesses for the crown (prisoner had no witnesses), that they might find the prisoner guilty of a misdemeanor under the act last referred to." These are the very words of the learned Judge, and I refer to them particularly because, in order to enable me to frame an opinion on the question of law referred, they are in my opinion important. Thus it is shown that the prisoner was put on his trial for larceny, but that the jury did not pronounce upon that issue by saying that the prisoner was not guilty of that crime. According to the report of the learned Judge he was of opinion (and I concur with him) that the jury ought not to have found the prisoner guilty of larceny, but on the issue solemnly raised before them they have not made deliverance. They have simply found the prisoner guilty of a misdemeanor. The omission of the jury to find specifically on the issue of guilty or not guilty of the larceny charged, becomes of vital importance when our minds are brought to a consideration of the question reserved and submitted. The learned Judge concludes thus: "As the point was new, I reserved the question of law, and my direction, for the consideration of the whole Court in term."

The first consideration involved in this question is a momentous one. It is this: Can a prisoner indicted and tried for larceny be convicted of a misdemeanor under the section in question without the jury having antecedently to such conviction found directly, formally, and as of record, that the prisoner is not guilty of larceny? My undoubting conviction constrains me to answer that question in the negative. The language of the Legislature is as follows: "If on the trial of any person for larceny, the jury are of opinion that such person is not guilty of the offence charged in the indictment, but are of opinion that he is guilty of an offence under this section, they may find him so guilty." Two consecutive findings are thus demanded in order to demonstrate the opinions of the jury mentioned in the section. Undeniably both must appear on the record, otherwise there is error. If the verdict in this case does not

show a finding of "not guilty of the offence charged in the indictment," in respect of which the jury were sworn, "well and truly to try and true deliverance make," then the language of the record, to be true, must necessarily be as follows, viz., after the accustomed formula setting out the jury process: "And the jurors of the said jury empanelled and returned, &c., being called, come, who being elected, tried and sworn to speak the truth, of and concerning the premises, (that is to say, the issue joined as to whether the said *Edward Martin* is or is not guilty of the felony and larceny in the indictment aforesaid above specified,) upon their oath say that the said *Edward Martin* is guilty of a misdemeanor." This, inconsistent and absurd though it is, must necessarily be the language of the record roll, unless this Court can *proprio vigore* alter the verdict on file, find by implication and presumed intention what the jury have not found, and sanction inserting such implied verdict into a solemn record which imports incontrovertible verity. Such will be the inevitable result of this decision for which, I much fear, no precedent will be found in the records of criminal proceedings in *Westminster Hall*.

I have already said that I concur with the opinion expressed by the learned Judge, that this prisoner could not have been found guilty of larceny, the only crime mentioned in the indictment. It is certain that he could not have been so convicted, because he first obtained possession of the goods as a salvor, when he found them floating on the high seas. He thus, as the report shows, obtained the possession innocently and without any degree of criminality. In *Rex v. Christopher*, 1 Bell C. C., 27, the Court distinctly laid down the principle that, in order to convict the finder of property of larceny, it is essential that there should be evidence of an intention to appropriate the property at the time of finding, and that evidence of any subsequent intent to do so was insufficient. In that case the learned Judge told the jury that a felonious intent was necessary to every larceny, but that the intent might be inferred from acts subsequent to, as well as immediate upon the finding, and that if the prisoner, when he discovered the owner, did not take measures to find him, they might from his behaviour infer such intention.

The Court of Criminal Appeal, however, held this direction wrong, as it was calculated to lead the jury to suppose that a felonious intent subsequent to the finding was sufficient. *Rose*, 629. It is quite true that this prisoner knew from the first that these were wrecked goods, and that they had an owner who might have been discovered; that circumstance might in a certain sense distinguish his case from that of the prisoner last referred to. But that is quite immaterial, for it is certain that he had no felonious intent when he became possessed, and, therefore, notwithstanding his subsequent behaviour in relation to the goods on board his vessel, to which he transferred them, he was not guilty of larceny. In the case of *Rex v. Preston*, 2 Dear C. C., 353, which was that of a lost bank-note found by a person who appropriated it to his own use, it was decided that the jury are not to be directed to consider at what time the prisoner after taking it into his possession resolved to appropriate it to his own use, but whether at the time he took possession of it he knew or had the means of knowing who the owner was, and took possession of the note with intent to steal it, for if his original possession of it was an innocent one, no subsequent change of his mind or resolution to appropriate to his own use would amount to larceny. This is, of course, decisive to show that no inference of a felonious intent at the time of the original taking could be drawn from any subsequent acts of the prisoner, on board the *Teazer*, which are the only acts reported.

But if the prisoner had committed larceny, it was larceny committed on the high seas. The case would not have been within the provisions of the 18 & 19 Vic., chap. 91, sec. 21, that offence not having been committed on board a *British* ship, or in a foreign port or harbor. It would have been within the 12 & 13 Vic., chap. 96, and if the indictment had been framed under it, the prisoner (if guilty of larceny) might have been convicted under it.

The learned Judge has not in terms asked for our opinion on the point of jurisdiction, (which does not appear to have been taken at the trial, although it was at the argument,) but he has in effect done so when he submitted the question as to the legality of the prisoner's conviction for the statutable

misdemeanor. I feel myself unable to express an opinion on that subject without inquiring whether the learned Judge had jurisdiction to try the larceny, for if he had not such jurisdiction, all the proceedings before him are void. The prisoner in such case could not have been legally acquitted so as to discharge him from liability to be tried for the same larceny by a competent tribunal. Then it is to my mind clear beyond question that he could not be legally convicted of the offence of "fraudulent appropriation," which was not made the subject of an indictment against him for that offence. It is indispensable that he should have been legally acquitted of the larceny in order to make him liable to be convicted of the misdemeanor, under that same indictment for the larceny. This liability to conviction for misdemeanor under the statute, when the sole indictment is for larceny, is merely accessorial to a legal and final acquittal for the latter offence. The learned Judge has reported that he directed the jury, if they believed the witnesses for the crown that they might find the prisoner guilty of the misdemeanor. This is rather indefinite. If (as is probable) the learned Judge directed the jury to inquire into the intent indicated, and into the effect of the prisoner's acts in view of what is pointed out by the Legislature, then I think the jury were rightly instructed as to the ingredients of the statutable offence, but if what is reported (and I cannot imply what is not reported) was all that the learned Judge told the jury, then I should feel myself bound to say that in my opinion they were not properly directed. In order to constitute the statutable offence indicated by sec. 110, chap. 21, of the *Dominion Acts* of 1869, it is necessary that the party charged should have had an intent to defraud by appropriating unlawfully to his own use, or to the use of some other person, property, and that he should have so appropriated as to deprive some other person at least temporarily of the advantage, use or enjoyment of a beneficial interest in the property which such person had therein. Now the history of the property in question in this case, and of the acts of the prisoner in relation to it, and to any person interested therein, as reported, is as follows: The property was a portion of the cargo of a ship wrecked when on her voyage to *Halifax*, and it was picked up by the prisoner and

others, his boat's crew, as salvors, when it floated with other goods on the high seas. The prisoner with others professing to be salvors, brought it in his boat to his own vessel moored near the wreck. When on board of her the property was taken out of the tin-lined box that contained it when it was found, was put by the prisoner part into his cabin, and the remainder into the hold of his vessel. A witness proved that the prisoner claimed a portion of the property so salved, and that he said he had given portions of it to the other salvors. The same witness also testified that on the prisoner's refusing to give him a portion of the property which he claimed from the prisoner, over and above what he had fraudulently received from him, that same witness informed against the prisoner. It was proved that *De Wolfe & Son* acted as agents for the line of steamers of which the wrecked vessel was one, and settled with some of the salvors, and that the captain of the steamer wrecked remained about her for ten days or so after she got on shore. We are informed by the report of a proved admission by the prisoner, (and his admitted act was clearly done unlawfully, and with intent to defraud somebody beneficially interested in the property,) that he had appropriated a portion of it to the use of other persons not entitled to it to whom he gave it. But it occurs to me that it may be questionable whether the offence under section 110 would be complete if the facts did not show some particular defined person, beneficially interested in the property appropriated at the time of the appropriation. The language of section 23 of chap. 19 of the *Dominion Acts* of 1869, relative to forgery is (identical in that respect with section 110): "Whosoever with intent to defraud, forges," &c., and the Legislature deemed it necessary by section 51 of the same statute to enact that it shall be sufficient in any indictment for forging, &c., where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party did the act with an intent to defraud." If there be a reasonable doubt on this point, the

state of facts reported would not seem to support the conviction.

Another view of this case remains to be considered and in relation to it I must be permitted to say that my mind is unable to conceive of any possible answer that can be given to the argument of its conclusiveness. The learned Judge has asked from the Court its opinion as to whether the prisoner has been rightly convicted for a misdemeanor. To that question I answer, in addition to what I have already observed, as follows: Looking at the facts reported, and at the indictment before us; at the indictment as containing an express charge of larceny, and in view of section 110, an implied charge of fraudulent appropriation, and regarding all these in the light of the common law, and of every statute that can bear on the case, the Supreme Court of this Province had no jurisdiction whatever over any matter which was in issue before the learned Judge at the trial which he convicted. All the facts, as they are reported, took place on the high seas, or on board a *British* ship on the high seas, and not within the body of the county of *Halifax*. The indictment contains no allegation that the offence charged was committed on the high seas or within the jurisdiction of the Admiralty. The county of *Halifax* is the *venue* stated in the margin, and in every count the *venue* is laid at *Herring Cove*, in the county of *Halifax*. *Chitty* says (*Criminal Law*, vol. 1, p. 177): "At common law the *venue* should always be laid in the county where the offence was committed, although the charge is in its nature transitory. It is an essential ingredient in the evidence on the part of the prosecutor to prove that it was committed within it." Now turning to the point of jurisdiction, we find the same learned author at page 186 of the same volume thus stating a familiar principle: "At common law no offence committed on the high seas could be enquired of." Then again in the second volume of the same work, page 3, we find the language of the precedent of an indictment for an offence within the Admiralty jurisdiction to be found in these words: "And the jurors say that with force and arms upon the high seas, and within the jurisdiction of the Admiralty of *England*, in and on board of a certain ship called, &c., then and there being feloniously, &c." An allega-

tion in the indictment that the offence was committed on the high seas is indispensable to give the Common Law Court jurisdiction over a subject matter occurring on the high seas, unless some statute be shown to have dispensed with it. It is in terms required by the modern statutes governing such cases in *England*, viz., the 24 & 25 *Vic.*, chap. 96 (the *Larceny Act*), sec. 115, and by the 24 & 25 *Vic.*, chap. 94, sec. 9. It is so absolutely necessary under the 12 & 13 *Vic.*, chap. 96, or under the 18 & 19 *Vic.*, chap. 91, sec. 21, noticed by the learned Chief Justice, that no Court in Her Majesty's dominions therein referred to has jurisdiction without it. By those statutes, the only ones that effect the case, the jurisdiction in question is only given to an ordinary court of justice in Her Majesty's dominions provided the prisoner (if he be a *British* subject) indicted, charged with larceny, committed the crime or offence of which he is charged either on board a *British* ship on the high seas, or in a foreign port or harbor. The crown cannot, of course, be in any stronger position against this prisoner, charged by legal implication only, with a fraudulent appropriation under section 110, than it would have occupied if the prisoner had been so expressly charged. The case then, as respects this last view that I have taken of it, stands thus: The prisoner charged with the statutable offence of a fraudulent appropriation of goods, as if committed in the county of *Halifax*, has been found guilty, although the crown proved that the offence (if committed at all) was committed by the prisoner within the jurisdiction of the Admiralty, and not within the county of *Halifax*. How then can this conviction be sustained?

From the reasons which I have stated I am of opinion that the prisoner ought not to have been convicted.

TREMAINE v. HALIFAX GAS LIGHT COMPANY.

APPLICATION was made to set aside a bail-piece entered into on behalf of defendants on an appeal, upon the grounds;

First: that one of the bail was a defendant in the action.

Second: that he was a barrister and attorney of the Court.

Third: that neither of the bail had justified in an amount double the amount of the verdict.

Held: as to the first objection, that the fact of one of the bail being a stock-holder in the defendant company did not incapacitate him from becoming bail. As to the second, that not having practiced for nearly half-a-century, the objection did not apply, and, lastly, that the third objection could be cured by amendment which the Court had power to grant.

McCULLY, J., now, (December 28th, 1872,) delivered the judgment of the Court:—

This was an application upon affidavit made before me at Chambers, and I granted an order *nisi* returnable the first day of term, to set aside a special bail piece or recognizance entered into on behalf of defendants to respond the judgment to be finally given in this cause under section 197 of our *Practice Act*, upon the grounds, first, that *John J. Sawyer*, one of the bail, is a defendant; secondly, that he is a barrister and attorney of this Court, and, lastly, because neither he nor the co-bail, *Thomas A. Ritchie*, had justified in a sufficient amount, that is to say, not in double the amount of the verdict. As regards the first ground, the affidavit of plaintiff states that *Sawyer* is a shareholder and director in defendant company. But no authorities were cited to show that such a relation to a joint stock company would incapacitate a party to become bail, and in the absence of any I do not see why it should. As regards the second objection, *Sawyer* comes forward and swears that he has never practised as an attorney for the last forty-eight years. Now, although it is an ancient rule of the Supreme Courts of law in *England* that no attorney shall be bail in any action or suit depending in the courts, and which may be said to be in force here under the 243rd section of our *Practice Act*, legalizing the practice in *England* previous to, and in force, 1 *Wm. IV.*, yet even there this has long been held to apply only to practising attorneys, and it has always been held that an attorney is liable to an action on his recognizance of bail, though contrary to the rule of court that he should be bail at all. See 1 *Chitty*, 714. But a person who swears that he has never practised as barrister or attorney for

nearly half a century will scarcely be held to be disqualified as an attorney, much less as a practising attorney, to become bail. As regards the third objection, that the bail had not justified in an amount sufficiently large, there is much force in it, and if it were not that the Court possesses the power to allow an amendment in such a case, the bail piece would probably be set aside. As to the power to grant amendments in such cases, see *Hall's Bail*, 1 Chit. R., 79; see also *Hayward's Bail*, 1 Chit. R., 11; see also *George v. Barnsley*, 1 Ch., 13, showing that the Court exercises, and has always exercised, the power of allowing or refusing amendments in cases of bail. See also *Forbes Bail*, 2 Dowl., 586; *Chit. Archbold*, 837; *Peters Dig.*, 270.

But why should the Court be invoked to make this rule *nisi* absolute? *Cui bono?* The order made absolute would only strike down the bail piece and leave the rule taken out for a new trial untouched. It may be contended, possibly that if the bail piece were set aside for irregularity, the rule for a new trial, and the entry of the cause upon the docket for argument, would fall with it. That, to say the least of it, is very questionable, and the case of *Hopkinson v. Salembier*, 7 Dow. P. C., 493; 5 *M. & W.*, 423, is authority, I think, rather to the contrary. There the defendant was held to bail on an insufficient affidavit, and the application was to set aside the *capias*. Held the application should have been to set aside the Judge's order. See also the case of *Thorpe v. Bear*, 2 B. & A., 373, and *Pyke v. Davis*, 4 Jur., 395, to show that in general applying to set aside proceedings on the ground of a certain irregularity, is a waiver of any other irregularity known to exist.

The rule *nisi*, we think, to be available for plaintiff's purpose, should either have been to set aside the bail piece and the rule for a new trial, or to set aside the bail piece and all subsequent proceedings thereunder on the part of defendant, or to that effect.

The Court, therefore, are of opinion that the rule should be discharged, reserving the question of costs, and that defendants be permitted to amend, on application to be made for that purpose, if they see fit at any time within four days, by having proper bail duly justified.

BELLONI v. SYDNEY & LOUISBURG RAILWAY CO.

ACTION was brought by plaintiff against defendants a company incorporated in Nova Scotia, but residing in the United States, and not British subjects. An attorney in Halifax was retained by them to defend the cause, and took some proceedings therein, and, according to the affidavit of plaintiff's attorney, promised to appear and plead. This, however, defendant's attorney denied. Plaintiff's attorney, after some years delay, applied to the Court for an order requiring defendant's attorney to enter an appearance in order that the Court might have jurisdiction.

Held, that if defendants' attorney had given a signed undertaking to appear, he would be compelled to do so; but that otherwise the Court had no jurisdiction, and could not grant the desired order.

MCCULLY, J., now, (January 3rd, 1873,) delivered the judgment of the Court:—

This is an appeal from the order of Mr. Justice *Wilkins* made at chambers, requiring Hon. *W. A. Henry*, Q. C., to file an appearance for defendants in this cause conformable to an alleged verbal undertaking so to do. *McDonald*, Q. C., for plaintiff, *Henry*, Q. C., for defendants.

The present is a second argument. This case was heard in *July* term, 1872, before three Judges who did not concur in their opinions, and was now argued before the whole Court, Judge *Dodd* absent and Judge *Ritchie* disqualified. The action was brought against defendants, who are a company incorporated in *Nova Scotia* but residing in the *United States*, out of the Province, not being *British* subjects, under part 2nd of the *Practice Act*, chap. 134, R. S. At some previous stage of the cause a question arose, and after argument this Court decided that section 2 of the second part of the *Practice Act*, applicable to persons residing out of the Province not being *British* subjects, does not apply to incorporated companies. (*Vide 2 N. S. Decisions*, p. 73.) Therefore unless or until an appearance has been filed this Court possesses no jurisdiction. After the writ issued 17th *September*, 1868, and had been served upon the president of the company in the *United States*, *Mr. Henry*, it appears from his own affidavit, was retained by defendants as their counsel and attorney to defend the suit. Without filing or serving any appearance he moved this Court and obtained an order *nisi* to change the position of the cause on the trial docket, and *J. N. Ritchie*, Esq., plaintiff's attorney, swears that *Mr. Henry* "promised from time to time that he would appear

and plead, &c." This allegation, however, is met by *Mr. Henry* swearing as follows: "And I further say that I did not at any time promise the said attorney to appear in this cause, &c.," although he admits in another portion of his affidavit that he requested plaintiff's attorney not to mark default, and explains his reasons for doing so. The contention on the part of plaintiff's counsel now is, that *Henry*, having sworn that he was retained as counsel and attorney of defendant, that having promised verbally to appear as alleged, and having either himself or by his partner (as plaintiff's attorney swears he believes), when the cause was called first day of term on the trial list, answered "*for trial*," and having sued out the rule *nisi* above referred to, he is now bound and compellable, and should be required to file an appearance in this cause. On the other side *Mr. Henry* swears that he never promised to appear in the cause. His affidavit, however, warrants the conclusion, I think, that in the early history of the cause he intended to file an appearance, and it was perhaps no strained conclusion on the part of plaintiff's attorney that he should suppose that he would file an appearance, but *Mr. Henry's* clients, before any appearance actually filed, having consulted counsel abroad, cautioned him against filing the issued appearance, and eventually gave him such instructions as appear by the letters and affidavits read as would amount to a positive disobedience of his instructions had he filed the appearance demanded by plaintiff's attorney.

Mr. Justice Wilkins having made the order *nisi* requiring him to file an appearance absolute, and there being an appeal therefrom, this Court is now called upon to decide whether, under the facts set forth in the affidavits read, the substance of which is given as above, the Judge's order made should be confirmed or reversed.

There can be no room for doubt that if an attorney of this Court gives an undertaking to appear in a cause in his character of attorney if the cause is one over which the Court possesses jurisdiction, the Court has the power and would enforce such undertaking or punish the breach of it in a summary way. According to some authorities, says *Archibald*, 12th ed., page 103, the undertaking must be in writing and signed by the attorney, but he adds in one case it seems a

verbal undertaking was considered sufficient, and there appears to be no reason why it should not be so. On this subject *Tidd* says: "Where an attorney of either bench has accepted a warrant or subscribed a process, declaration, or warrant to appear, the rule is that he shall be compelled to cause an appearance or be liable to an attachment, or put out of the roll, and the party is not to be received to countermand such appearance after his retainer." In the foot-note he gives as authority *R. M.*, 1544, sec. 10; *Lofft*, 192, 3, by which it appears that the undertaking must be signed. *Tidd*, 4th ed., p. 241.

It is not contended that there was any written undertaking in this case. Then if we adopt the usual rule that when two affidavits conflict they neutralize each other unless there is some mighty preponderance to incline the scale one way or the other the plaintiff's case is met, I think, *in limine*.

But if that be not the case here, how can it be expected that this Court will attempt to exert its summary jurisdiction in a case where the want of a proper writ, or rather in the absence of the defendants, and without means of compelling them to appear, it possesses no jurisdiction over the cause or over the parties.

At page 101 of his *Legal Maxims*, *Broom* says: "Even Parliament has no power save in matters of procedure to legislate for foreigners out of the dominion, beyond the jurisdiction of the *British* crown," citing *Lopez v. Burslem*, 4 Moo. P. C. C., 300, 305. "It is clear," observed *Park*, B., in *Geffreys v. Boosey*, H. L. C., 815, that the Legislature has no power over any persons except its own subjects, that is persons natural born subjects or residents, or whilst they are within the limits of the kingdom." Now there being no procedure (legislative) to call before this Court a class of defendants such as those in this action, it is evident to me that the process issued out is not merely irregular or voidable, but absolutely void. *Chit. Archbold* lays down the rule thus: "When the proceeding adopted is that presented by the practice of the Court, and the error is merely in the manner of taking it, such an error is an irregularity, and may be waived by the laches or subsequent act of the opposite party. But when the proceeding itself is altogether unwarranted, and

different from that, if any, which ought to have been taken, then the proceeding in general is a nullity, and cannot be waived by any act of the party against whom taken." 12th ed., p. 147.

In the want of jurisdiction the plaintiff here is unable to do as in the cases reported upon this subject. There the practice as a rule would seem to have been for the plaintiff after an undertaking promised and not performed, to proceed by a default, judgment and execution, and leave defendant to apply for relief. And in such cases the Court as a rule refuses it, where the attorney is a person able to respond to the aggrieved party. See *Fisher*, 447-449, and cases cited. For the want of jurisdiction and, because even if the defendants had not been an incorporated company, and so not amenable, but private individuals within the purview of the statute, plaintiff could take no step without a Judge's order, it is therefore clear that a broad line of distinction is perceptible between this and ordinary cases of writs issued at common law where the jurisdiction is unquestionable.

The case of *Forbes v. Smith*, 10 Exch., 717, was relied on by plaintiff's counsel as an authority. There, however, defendant was a *British* subject residing in *France*, and served with a summons in the form prescribed as applicable to a *British* subject residing abroad. Defendant appeared, and finding after declaration that the cause of action did not arise within the jurisdiction of the Court, applied to set the writ aside. Held there was no irregularity in the writ itself. Rule refused. But that distinguishes the two cases, because the Legislature has never provided for serving a corporation residing abroad, as decided in *Ingate v. Lloyd Austriaco*, in 4 C. B., N. S., 704.

Under no known process of law could plaintiff compel an appearance on the part of defendants themselves, because there is no provision at common law or by statute existing enabling him to sue defendants in the character of an incorporated company residing abroad. In none of the several aspects of the case in which it presents itself, or under any of the authorities cited, can he, I think, compel *Mr. Henry* to file an appearance, and I therefore am of opinion that the Judge's order must be reversed, and that the order *nisi* should be discharged.

THE BANK OF NOVA SCOTIA v. JAMES FORMAN
ET AL.

PLAINTIFFS' cashier gave a bond wherein he was joined by five sureties for his fidelity and good conduct, the penalty of the bond being \$40,000, and the condition reciting that each surety was bound in the sum of \$8,000. The cashier became a defaulter in a very large amount, and the plaintiffs entered into negotiations with K., one of the sureties, which resulted in an agreement between them, whereby K. undertook to pay one-fifth of the balance due upon the bond after the deduction of certain credits, and gave his note for the amount. Subsequently, plaintiffs sued upon the bond, crediting in their particulars, the sum K. had promised to pay, but had not paid up to date of the trial. K. pleaded to the writ a number of pleas, one being that the bond was a several, and not a joint and several bond, and seven pleas on equitable grounds. The jury found for plaintiffs in a less amount, however, than they claimed, but they acquiesced in the verdict, and made no attempt to disturb it. K., alone of the defendants, resisted the verdict, contending that the bond was a several obligation, and that the receipt given by plaintiffs to him at the time of the settlement between them being in proof, should be considered as payment to that extent on his own account.

Held, that K. having invoked its equitable jurisdiction, the Court had full power to deal with the case, that the bond was a joint and several obligation, that if K. had actually paid the amount mentioned in the receipt he might have ground for complaint, but that not having done so the verdict for plaintiff must stand.

YOUNG, C. J., now, (February 4th, 1873,) delivered the judgment of the Court as follows:—

This action is brought upon a bond dated 1st *July*, 1865, in the penal sum of \$40,000, executed by *Mr. Forman*, the then cashier of the Bank, and by *Messrs. Keith, McKinlay, Yeomans, Stanford*, and *E. M. Archibald*, as his sureties for his fidelity and good conduct in that capacity. By the bond itself these six obligors are held and firmly bound to the Bank by its corporate name in the above sum, for the payment whereof they bind themselves, and each of them by himself, their and every of their heirs, executors, and administrators. In the condition it is recited that the said five sureties had undertaken to become bound for the said cashier, that is to say, "the said *Alexander Keith* in the sum of \$8000, and so with the other four each in the like sum of \$8000, in and by the said bond or obligation, and subject to the conditions following;" and then the conditions are set out in very ample terms. In this judgment I shall have to deal chiefly with the pleas of *Mr. Keith*, the 22nd of which is, that the bond is a several and not a joint bond; and as this position was strenuously urged at the argument and strikes at the very root of the action, I shall look into it first of all.

It was alleged, and several cases cited to show, that the recital in a bond would often control the condition, which is undoubtedly true. In the case of sureties, in *Sansom v. Bell*, 2 Camp., 39, two cases were cited in which all the previous authorities were referred to. Lord *Ellenborough* fully acceded to these cases, adding, "They apply to the time for which sureties shall be liable, and where this is definitely marked out in the recital of the condition, it is not to be extended by any subsequent general words,"—that is to say, the agreement of the parties expressed on the face of the instrument shall be carried out. "In truth," says *Wightman*, J., in *London Assurance Company v. Bolt*, 6 Q. B., 526, "the recital is the proper key to the meaning of the condition." But that is not the contention here. No one would contend now-a-days, when the old common law doctrine, by which, upon a breach of the condition, the whole penalty of a bond was recoverable, has been abrogated by statute and by practice, that any one of these sureties could ever be held liable at common law, and certainly not in equity, for more than \$8000 each. "Care should be taken that the condition of a bond should be clear and explicit, for the condition of the bond being in favor of the obligor, as protecting him from the penalty is liberally construed, and hence any words expressing the intention will create the condition." *Butler v. Wigge*, 1 Saund., 61; and 1 *Salk.*, 178; 1 *Ld. Raymond*, 335.

This is the substance of the thing, on which all must agree. The objection is rather a point of pleading and of form than of substance. The point is, can a joint action like this be sustained on a bond so expressed, and, as it must be conceded, inartificially drawn, or was the Bank compelled to institute separate actions against each, and, if so, for what sum? Would this bond sustain an action against *Forman* for \$40,000, which would unquestionably lie, and against each of his sureties for \$8000 only, and in the latter case how would the declaration be framed? The attempt would be fraught with difficulties greater, I think, than any that meet us here. But upon the strictest rule of law, I am of opinion that this is to be accounted a joint as well as several bond. "If three enter into an obligation and bind themselves in the words following: *Obligamus nos et utrumque nostrum per se*

pro toto et in solido; these make the obligation joint and several." *Dyer*, 196; 3 *Bac. Abridgement*, 97. "If three are bound in a bond in these words: *Obligamus nos et quemlibet nostrum conjunctim*; this is a joint obligation and one of them alone cannot be sued; for the word *conjunctim* makes the obligation joint, which the word *quemlibet* cannot make several." 1 *Moor.*, 260; 3 *Levin.*, 206. And see *Burge on Suretyship*, 403; *Shep. Touchstone*, 376. In *Ingleby v. Swift*, 10 *Bing.*, 84, 3 *Moo. & Scott*, 288, where the question arose whether the penalty of the bond could be reduced, in virtue of a recital in the condition from £1000 to £500, which the Court refused, Judge *Gazalee* said: "The construction we put upon the bond is consistent with all the decisions; for in none of them have the Courts altered the penalty of the bond. If the sureties have been imposed on a court of equity will afford them relief."

This objection being disposed of, before touching the pleadings, it will be more convenient to review the leading facts of the case, as they appeared in evidence. The trial took place before Mr. Justice *McCully* in November, 1871, when the then president and cashier, the assistant cashier who was the principal witness, and two of the clerks, one of whom had been in the Bank seven, the other fourteen years, and three of the directors, were examined, and presented as extraordinary a picture as was ever exhibited in a court of justice; including a letter of *Mr. Forman*, 23rd December, 1870, perfectly unique in its style, acknowledging that after the balance sheet had been carefully checked it showed defalcations, which are veiled under the modest name of discrepancies, amounting to no less than three hundred and ten thousand dollars. Two of the sureties were directors, men of known intelligence and business habits. The system of fraudulent appropriation began in 1844. In 1865 *Forman* had abstracted from the Bank about two hundred thousand dollars, which had swelled in 1870, when the explosion occurred, to three hundred and thirty thousand dollars, and are finally stated at three hundred and forty-four thousand dollars, of which the Bank has recovered from his estate one hundred and seventy-nine thousand dollars,—net loss independent of interest one hundred and sixty-five thousand

dollars. It appears also that he carried off \$20,000 in one sum in *August*, 1865, a month after the execution of the bond; the deposit deficiencies after 1865 were \$85,000; he had overdrawn his account \$47,000. Yet notwithstanding some murmuring of a dissatisfied shareholder and a sort of investigation thereafter, no suspicion was excited among the clerks till *March*, 1870, and *Forman* retained the full confidence of the directors till the end of *July* in that year. The system was equally extraordinary with the results. The money was annually counted and found to agree with the cash book. Everything was fair on the surface, and everything rotten below. The falsifications on the books were endless, but so skilfully done as to defy detection. A cashier seems to be armed with a tremendous and irresponsible power, of which, for one, I must confess, I had no previous conception, and which demonstrates the necessity of new guards and checks, that in some cases, I learn, if not in all, since this catastrophe, have been introduced into our banks.

I think it well to extract a few passages, leading to these conclusions, first, from the testimony of *Mr. McIntosh*, who had been nearly seventeen years an officer of the Bank, and who obtained *Mr. Forman's* letter of *December* already referred to, as he tells us without guarantee or promise. Speaking of the cash and day books and two entries therein, he adds: "The result is that \$20,000 might be abstracted (that is by the cashier) without any way of showing it;" and again, speaking of an error, he says: "That would enable the cashier to abstract \$26,000 without it appearing;" again: "I think about 1844 he began to make false entries;" again: "If he took the money, \$11,000, the day he made the false entries, he must have taken it out of the outer vaults;" "So far as I know the directors did not know *Forman's* account was overdrawn \$24,000 to \$25,000, and had been so for many years from 1854;" "The cashier could make alterations (in the books) as many as he liked, and he could make any alterations he liked;" "*Forman's* account was overdrawn when I went there; it grew as I grew; *Forman* paid no interest on his overdrawn account; it was my duty to report overdrawn accounts to the cashier." *Johns*, one of the clerks, says: "In *March*, 1870, was my first discovery of anything

wrong; I found it then about \$30,000; I looked upon it as an error for over a month; did not communicate it to any director; two months after, there was enough to satisfy me there was a false entry." The president says: "*Forman* had custody of his books, so far as I know, up to the date of his dismissal; no clerk or teller has a right to examine the cashier's book without his authority." But the most surprising piece of testimony is that of *Mr. Menzies*, the present cashier: "I have been connected with banks since 1849; a cashier could abstract large sums, and still the cash-book and the count of money in the vaults agree; if a sum of money was in the hands of the cashier, say \$10,000 on Monday morning, and during the week the tellers pay over \$90,000, the cashier could abstract \$40,000 of this and make his cash-book agree with the balance, as he only is the check on himself."

There is one other transaction which I must shortly notice. A body of conveyances and deeds was given in evidence, from which it appeared that contemporaneously with the bond, *Forman* conveyed his long wharf property to two of his sureties as a protection to the sureties and to the Bank, which was sold in 1867 with the assent of the Bank for \$24,000; half of this was paid to the Bank in cash bonds and appears to the credit of the bond; for the other half, with the same blind confidence which marks all these transactions, *Forman* was permitted to take a mortgage in his own name, his assignment of which has led to another suit now pending in the Equity Court, and of which I say nothing. The account between the five sureties and the Bank at the close of 1870, as stated by the Bank, stood thus:—

Total security.....	\$40,000
City Bond (being the above payment.....)	\$12,000
January Coupons.....	360
	<hr/> 12,360
	<hr/> \$27,640
Proportion of each bondsman	5,528

A negotiation was opened between the Bank and *Mr. Keith*, who was one of the directors, and the following receipt was given:

"Received from the Hon. *Alexander Keith* the sum of Five Thousand Five Hundred and Twenty-Eight Dollars, being his proportion of the amount due by the sureties of *James Forman*, as authorized by the directors."

"(Sgd.) W. C. MENZIES, *Cashier*."

"*Halifax, 4th February, 1871.*"

Of this sum \$528 has been paid, and the Bank hold *Mr. Keith's* note for \$5,000, which was produced at the trial, but not put in as evidence. Of the other sureties *Mr. McKinlay* has died, leaving executors who could not be sued at Common Law with the survivors, as against whom or the two of them who could be served (*Mr. Archibald* not being within the jurisdiction) an action was directed. There was no disposition on the part of the Bank or its counsel to sue *Mr. Keith*, but holding the bond to be joint as well as several, they could not sue the others in one action without suing him, and accordingly he was made a defendant and the writ was issued 4th April, 1871, with the particulars endorsed, crediting as against the \$40,000 the City bonds \$12,000 and cash from *Mr. Keith* \$5,528, leaving a balance of \$22,472.

In his charge the Judge instructed the jury that the Bank was entitled to a verdict under the evidence for the above balance, but as far as *Mr. Keith* was concerned, he thought under the evidence they should find a verdict in his favor. The jury, however, by some process which we can only conjecture, found a verdict for the plaintiffs for a balance of \$12,224. Now, if the Bank is entitled to anything, it is entitled to a verdict for \$22,742, the balance it claimed; but the Bank moved for no rule, and declared at the argument through their counsel that they acquiesced in the verdict as it stood, and that they claimed from *Mr. Keith*, independent of any question of costs, nothing more than the amount of his note in their hands. These admissions of counsel made in open court and entered in our minutes, bind them.

Another remarkable circumstance on the argument was this, that *Mr. McDonald*, of counsel for *Mr. Keith*, was supported by *Mr. W. A. Johnston*, who declared on the first day, the 18th December, that he appeared for *Mr. Keith* only as it is entered on my minutes; but, finding a difficulty in this, stated next morning, the 19th, that he represented all

the defendants who were served. The rule is so taken and we must deal with it as such, notwithstanding the repeated averments of the plaintiffs' counsel that the resistance to the verdict comes from *Mr. Keith* alone.

Now we must turn to the pleas, and for the reasons already assigned, I shall refer wholly to *Mr. Keith's*. They are 26 in number, addressed to the writ, and 6 breaches alleged therein. The first to the eighth pleas contain general denials disproved by the evidence. The 9th plea alleges large payments to the Bank exceeding the alleged defalcations, which is not the fact. Large sums were realized by the Bank out of the conveyances and assignments in proof, which the Bank had a right to appropriate towards the payment of their debt, looking to the sureties for so much of the deficiency as is covered by the bond. The 10th to the 16th pleas are on equitable grounds; of these the 10th to the 13th charge the directors with gross carelessness and neglect of duty, by which the defalcations and false entries of *Forman* arose, with knowledge thereof in the directors or some of them withheld from the defendant, and with the passing and auditing of his accounts from year to year, and thereby deceiving the defendant. These are grave allegations, but they are so absolutely unsustained by proof that they were never even mentioned at the argument. The 14th and 15th pleas touch the Long Wharf property, the full proceeds of which probably entered into the contemplation of the jury in making up their verdict. The 16th is the same in substance with the 9th, alleging a compromise with *Forman*, of which there is no proof. The 17th to 26th are at common law, and the substance of them has already engaged my attention. The 18th alleges that *Mr. Keith's* liability, if any, does not exceed \$8 000, which sum it says he has paid to the plaintiffs, and the plaintiffs received in full satisfaction of his said liability under the bond.

And now, as regards *Mr. Keith*, the main question arises, what is to be done in view of these pleas and of the evidence, with the verdict that has been rendered. Ought the verdict, as recommended by the Judge, to have been for *Mr. Keith*, considering his note as a payment, and leaving the Bank to their recourse thereon, that is, to a fresh action against

him, should he resist payment, as he has hitherto resisted it ; or has the Court the power, and if so, ought the Court to exercise it, to treat the verdict as having ascertained and settled the facts of the case, and enabling the Court to deal with it on the principles of Equity. This course was warmly deprecated by the defendants' counsel, and as it lies at the very bottom of our jurisprudence and involves the most important consequences, not in this case only, but in all others resting in whole or in part on equity principles, it demands our most attentive consideration.

Equitable defences, in actions at common law, were introduced into the *English Courts* by the *Common Law Procedure Act*, 1854, secs. 83 to 86, the numerous restrictions and decisions on which are to be found *Chitty's Arch., Q. B., Prac.*, (12th edition), 253, and *Day's Common Law Procedure Acts*, 278 ; these sections have been partly reenacted here. The proviso in the 86th section we purposely omitted, and the whole character of the two legislations is essentially different ; their aim, indeed, was widely apart. By the Act of 1854 the courts in *England* had power to strike out any equitable pleading where it could not be dealt with by a court of law, so as to do justice between the parties. Whereas our Act of 1855, abolishing the Chancery Court, left the parties no other but this Court in which justice could be done. In 1853 our Legislature passed the 16th Vic., chap. 7, authorizing equitable defences in ejectment, the value of which we have so often seen in this Court ; but in *England* for the very technical reason that there are no pleadings, it has been held that an equitable defence cannot be set up in ejectment. (*Neave v. Avery*, 16 C. B., 328, *Chitty's Arch., Q. B. Prac.*, 1038.) So opposite was the spirit of our legislation and practice, that by the 5th section of the Act of 1853, (and still in our *Revised Statutes*), a defendant in ejectment having an equitable defence, and neglecting or refusing to avail himself of it, shall not be at liberty without leave of this Court, to apply for relief in equity.

We must go back then to the Act of 1855, the 18th Vic., chap. 23, the first section of which is as follows :—The Supreme Court shall have jurisdiction in all cases heretofore cognizable and determinable by the Court of Chancery, and

shall exercise the like power and apply the same principles of equity as justice may require, and as have heretofore been administered in that Court; and all writs which at present issue out of Chancery, shall henceforth issue out of the Supreme Court.

This was followed by the Act of 1860, the 26th *Vic.*, chap. 32:—In all causes in the Supreme Court in which matters of law and equity arise, the Court shall have power to investigate and determine both the matters of law and equity, or either, as may be necessary for the complete adjudication and decision of the whole matter, according to right and justice, and to order such proceedings as may be expedient and proper.

So our system continued till 1864, and in my opinion, and in that, I think, of most if not all of my learned brethren, it worked admirably well. The Act of 1855 was drawn with great care and derived from various sources, the *Ireland Procedure Act* of 1853, and bill in amendment thereof furnishing several of its clauses. Whether it was wise to change and interrupt its course is a point on which I am not called upon to pronounce an opinion. It has led to many anomalies and to numerous embarrassments familiar to the profession; but now it is perhaps too closely interwoven into our judicature to be eradicated. I think it right to say, however, in this review, that I am still warmly attached to a complete fusion of law and equity in one Supreme Court which will be adopted I think, ere long in *England*, upon the principle enunciated by Lord *Cairns* and endorsed by the Lord Chancellor, that "there is no difference in principle between equity and law, it is entirely a distinction of judicature and procedure." "It is high time" said Lord *Hatheway*, (29th April, 1870), in the House of Lords, "to put an end to the inconvenient and irrational distinction between law and equity which has crept into the *English* courts." Lord *Bacon* said that the administration of justice is the first duty of government, and it ought to be in the purest and simplest form. Chap. 124 of our *Revised Statutes*, (3rd Series), read in connection with chap. 125, creating an Equity Judge pursuant to the Act of 1864, has been largely modified by the Act of 1866, the 29th *Vic.*, chap. 11, and it is to be hoped that in the

fourth revision now in progress, these acts will be consolidated into one and rendered plain and intelligible; at present we must deal with them as they are, and the attention of the Court has been turned to the 10th section of the Act of 1866, which it has become our duty for the first time closely and analytically to examine. It runs thus in connection with the 9th:—"But, nevertheless, in all actions at law in the Supreme Court, on the trial or argument of which matters of equitable jurisdiction arise, that Court has power to investigate and determine both the matters of law and equity, or either, as may be necessary for the complete adjudication and decision of the whole matter; and also all actions of law to which equitable defences shall be set up in virtue of the sections of this chapter, under the head equitable defences, from section 43 to section 50, both inclusive, are, and shall continue to be tried, considered, and adjudicated by the Supreme Court and its Judges, in the same manner as regards the said several cases respectively, as the Supreme Court or the Judges thereof had power to do when the act for appointing a Judge in Equity was passed. But it shall be lawful for the Supreme Court, or any Judge of that Court, before whom the consideration, trial, or hearing of any question of equitable jurisdiction, or any such mixed questions of law or equity may come, if they or he shall deem it expedient and conducive to the ends of justice to do so, to order the case or any subject matter arising thereon to be transferred to the jurisdiction of the Equity Judge, to be dealt with according to the principles of equitable jurisprudence and the exigencies of the case."

Mark the language of this 10th section, "All actions at law, on the trial or argument of which matters of equitable jurisdiction arise;" and also, "All actions at law to which equitable defences shall be set up in virtue of chap. 124, secs. 43 to 50." What is meant here? It means all actions at law adjudicated for the ends of justice on equitable grounds, as we have held, invoking that adjudication on equitable grounds—not the inartificial pleas sometimes presented to us, claiming that there is neither law nor equity to sustain them, but only depending on principles of equity, which the Courts in *Westminster Hall* cannot as yet recog-

nize and act on, but which, by virtue of this section, are transferred bodily and as a whole to this Court. And how are they to be tried, considered and adjudicated? In the same manner as this Court or the Judges thereof had power to do from the year 1855, when the Court of Chancery was abolished, to the year 1864, when the Judge in Equity was appointed. This Court may transfer such cases, if they think fit, to the jurisdiction of the Equity Judge; but if they do not, they have all the powers of the Equity Judge in framing and enforcing their decrees. The narrow bounds of the common law no longer restrain them in the forms of its records and its judgments, they have the authority and the freedom of an Equity Court. All the sections of the *Equity Act*, chap. 127, (2nd Series), which are substantially the same as those of chap. 124, (3rd Series), then apply to them, and in the language of one of the sections, "the Court, on the final hearing of such cases, shall give judgment according as the very right of the cause and matter in law shall appear unto them, and so as to afford unto the parties a complete remedy upon the principles which prevail in Courts of Equity and may be applicable to the particular case."

We were urged not to interfere with the case on equitable principles, but we have no choice in the matter. Not only is an equitable principle brought in for the protection of *Mr. Keith*, limiting his liability under the bond and the receipt he holds, but he has invoked equitable principles in his pleas and brought this case within the very terms of the Act of 1866. Had the \$5,000 been actually paid, it would have been very different; but no payment is in proof, and the note is outstanding and must be produced by the plaintiffs' before payment can be enforced.

A new trial of this action would be of no avail, every material fact is in proof, and the plaintiffs acquiesce in the verdict, though the amount of their indisputable claim is largely reduced. It will be for them to apply by motion, as in the Equity Court, to this Court or one of its Judges thereof, for the fruits of their verdict in such way as they may be advised, when *Mr. Keith* will have an opportunity of being heard on equity principles, and a decision will be given con-

formably to those principles, which alone are adapted to do complete justice and afford an adequate remedy to the parties in this cause.

MCCULLY, J.—This cause was tried before Mr. Justice *McCully* in the Spring Sittings, 1872 at *Halifax*, and resulted in a verdict in favor of plaintiffs for the sum of \$12,000, the plaintiffs claiming by their particulars a balance of \$22,472. The action was brought upon a sealed instrument set out in plaintiffs' writ and declaration as a joint and several bond, conditioned for the faithful discharge of duty as cashier of the Bank of Nova Scotia, by the defendant *Forman*. There were averments of misconduct and seven several breaches of the condition of the bond assigned. The defendants, such of them as appeared, demurred in their pleadings, and the rule *nisi* taken for a new trial, purporting to be on behalf of all the defendants, now came on for argument, *W. A. Johnston* and *James McDonald*, Q. C., for defendants, *Blanchard*, Q. C., and *J. N. Ritchie*, for plaintiffs.

The pleadings are unusually voluminous. *Keith's* pleas are twenty-six in number, and seven of them, commencing with the tenth and ending with the sixteenth, were stated to be upon equitable grounds, and each of them was to the plaintiffs' whole declaration. It is worthy of remark here that plaintiffs claimed by their particulars the gross amount of the bond, viz., \$40,000, which was the penalty, and by way of credit they deducted \$12,000 city bonds, and cash from *Mr. Keith*, \$5,528, in all \$17,528, leaving as the balance the sum of \$22,472 as due on the bond.

It was pretty plainly made to appear on the argument that the party principally, if not the only party, dissatisfied with the verdict and pressing for a new trial, was *Mr. Keith*. And so far as the other defendants before the Court were concerned, unless the charge delivered to the jury by the presiding Judge could be successfully assailed, as to what constituted such negligence, &c., on the part of plaintiffs as relieved the defendants from their liability, there really was no room for complaint on their part. The view taken on the trial by the Judge was that so far as *Keith* was concerned, under his 18th plea which the recitals in the condition of the

bond substantiated, the bond should be by them treated as a several obligation, and that the receipt in proof, \$5,528, should be considered as payment to that extent on his own account, and in that case they should find their verdict in his favor, but should find a verdict for the balance of \$22,472 against the co-defendants. The jury, however, for some reason not explained, and not very apparent, seem to have treated the bond as a joint bond, and viewed it as plaintiffs had done themselves by their particulars, not only for \$17,528, but in addition have reduced plaintiffs' claim by a further amount of \$10,472. Had plaintiffs applied to have this verdict set aside for a new trial, in my view of the law they must have succeeded. But they, by their counsel on the argument, represent themselves as satisfied that the verdict should stand as it is, and refuse consent to its being disturbed.

After a good deal of research, and upon the best consideration I have been able to bestow upon the subject, I am of opinion that the bond sued upon is a joint and several bond, and if so it was optional with plaintiffs to treat it accordingly. They treat it in their writ as a joint bond, and while it is doubtless competent to *Keith* by an equitable plea to invoke the equitable jurisdiction of this Court for his protection, it must ever be borne in mind that he who asks equity must do equity. The courts of equity have long exercised a special jurisdiction over bonds and specialties. See *Madox v. Jackson*, 3 Atk., 374. There it was held that in equity where a right is joint and several by bond, the plaintiff must bring each of the debtors before the Court, for debtors are entitled to a contribution. See also *Collins v. Griffith*, 2 P. Williams, 313. And where parties are jointly liable to account, it may be prayed against one only as to what he has received. And where two or more are jointly bound, though regularly one of them alone cannot be sued, yet if process be taken out against all, and one of them only appears, and the others stand out to an outlawry, he who appears shall be charged with the whole debt; *Whedale's Case*, 9 Co., 119. In *Thomas v. Fraser*, 3 Ves., 308, a joint bond in equity was considered as joint and several. And as to when a bond is joint and when several, see 2 *Roll's*

Abr., 149; *Bac. Abr. Obl.*, 4; *Broom's L. M.*, p. 405; and a vast number of cases cited.

Seven of defendant *Keith's* pleas, as remarked, invoke the equitable jurisdiction of this Court. And although each of these pleas was to the whole of plaintiffs' writ and declaration on the argument, it may be contended that this did not warrant this Court to exercise a full jurisdiction over the whole case as a court of equity could exercise it where the proceedings are commenced by a writ sued out of the equity court. I am not aware of any precedent for such a position as that, and to hold that either or any party in a cause could invoke just so much equity as might square with his or their individual interests, and that the powers of the Court over the whole controversy were not plenary and complete, would lead to consequences in the highest degree embarrassing. When either party in a cause has invoked equity, whether by plea or replication, so far as my experience goes, this Court has hitherto granted all the relief to be obtained from a court of equity previous to the enactments contained in chap. 124, *Revised Statutes*, sec. 43.

It is well worthy of remark in this connection that the Provincial Legislature has placed no limits upon the jurisdiction conferred upon the common law courts when once equity is invoked by either party. The *C. L. P. Act*, 1854, secs. 83-86, very naturally qualify the exercise of equity powers by the common law courts of *England*. The court and the judges in *England* under sec. 86 possess powers to strike out equitable pleas and replications in certain cases, a clause not enacted here. And in ejectment, an equitable defence cannot be pleaded there; *Neave v. Avery*, 16 C. B., 328. With us by sec. 46, chap. 124, *R. S.*, an equitable plea is expressly given in ejectment, and any defence available in chancery may be set up under it by express legislation. Nay more, if defendant neglect or refuse to avail himself of an equitable defence to the action by sec. 50, he is expressly excluded from applying for relief in equity without leave of the Supreme Court. And what is still more important,—not only does the Supreme Court obtain and exercise equity powers when invoked by plaintiff or defendant, but every Judge of the Supreme Court, in the illness or absence of the Equity Judge, and in cases

requiring attention in the country, may execute the duties imposed upon the Equity Judge, and act as a court of equity. See sec. 2, chap. 124; also Acts of 1866, chap. 11, sec. 8. And by sec. 8, chap. 125, *R. S.*, the Supreme Court is erected into an appeal court from the decisions of the Judge in Equity. Again by sec. 10 of chap. 11, Acts of 1866, power is given by statute in all actions at law in the Supreme Court, on the trial or argument of which matters of equitable nature arise, to investigate and determine both the matters of law and of equity or either as may be necessary for the complete adjudication and decision of the whole matter, are the very words of the statute. And then follows a clause conferring all equity jurisdiction upon the Supreme Court and its Judges in reference to pleas and replication by way of equitable defences from sec. 43 to sec. 50 inclusive of chap. 124, as completely as possessed by them when the act appointing an Equity Judge passed. There can, therefore, be no room for controversy as to the powers of the Court to deal with this whole case.

Now it appears to me that the proper way to regard this controversy is to inquire whether the plaintiffs in the action have obtained any unfair advantage over the defendants or either of them by virtue of the proceedings up to the present. I am compelled in my view of the law, and the cases cited on the argument, to answer this question in the negative. Neither at law nor in equity have plaintiffs obtained aught, or acquired any advantage or position inconsistent with equity and good conscience, assuming that defendants were jointly liable for the penalty, or assuming that they were as asserted by *Keith's* 18th plea, only severally liable to the extent of \$8000, which he expressly admits that he was. Previous to the enactment in chap. 124, equity had no power over a court of law and has none since; never had here, or in *England*, or in the *United States*, and never attempted to act upon the law court, nor so much as claimed any supervisory power over them or their proceedings. See *St. Eq. Jur.*, 1570-71. Equity acts solely upon the party, and will enjoin him in a proper case from procuring any claim in a court of law over which the courts of equity have concurrent jurisdiction, and a more perfect means of doing complete justice. And see

Eq. Jurisp., sec. 875, same work. There it is said that writs of injunction are never addressed to the courts of law, they are only directed to the parties, and they are "only granted on the sole ground that from certain equitable circumstances of which the court of equity granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause." Now looking at this case from this standpoint, what has transpired to induce, or that ought to induce, this Court at the present stage of the proceedings, either to set aside the verdict or to stay the plaintiffs' hands?

The principal reason why this verdict should not stand, we are told, was because, supposing the charge of the Judge to be right, and the law to have been correctly laid down to the jury, because *Keith* being only liable for the one-fifth of \$27,640, viz., \$5,528, he had paid and discharged that liability. But do the facts warrant that assumption? Admit that he produced evidence, *prima facie*, that he had paid that sum, yet it is not in proof that it has ever been paid, and it was contended on the trial that he had not paid it but had merely given his note not then due, which note having been dishonored, plaintiffs' counsel on the argument refused to treat as payment. The bond, the higher security, strictly speaking, has never been released by plaintiffs nor legally discharged. For this Court to interfere at this stage of the controversy, under such circumstances, and even stay the plaintiffs in the prosecution of their remedy to indemnify themselves against the loss clearly sustained, much more to set aside their verdict, would be in my opinion to defeat instead of to promote justice.

On the argument the plaintiffs' counsel did not hesitate to give the most positive assurance that if the \$5,528 purporting to have been paid by *Keith* and received by them were actually paid, the controversy (unless, perhaps, so far as costs were concerned,) was at an end. On the part of defendants' counsel it was contended that the Court should not be affected in its judgment by any such statements. But I have yet to learn, I confess, that a party may not on an argument, and at any stage of a cause, make admissions adverse to his own interests.

Without laying down any abstract rule applicable to such a state of things, I do not hesitate under such circumstances to express it as my very deliberately formed opinion, that at present no reason exists why at law or in equity this Court should stay the plaintiffs in the prosecution of their cause by preventing them from making their verdict available to the extent of \$5,528 against *Mr. Keith*, unless it is made to appear that his note is sooner paid, and against the others for the balance of the verdict.

If in a more advanced stage of the proceedings any attempt be made on the part of the plaintiffs to violate any principle of law or of equity, this Court has clearly the power, and would if invoked readily exercise it, to control either party or any of the parties in the suit, and see that equity and good faith was done and kept by both parties.

I have not commented upon the cases cited on the argument as will be seen, because I have failed to discover their applicability. The case is a peculiar one, but its peculiarity to a large extent arises out of the fact that plaintiffs seem willing to forego a right they might themselves well have urged, to obtain a new trial. They doubtless have their reasons for this, and it is not necessary for the Court to pry into or inquire for them.

If there was any satisfactory proof that *Mr. Keith* had actually paid plaintiffs the \$5,528 for which he holds their receipt, there might be good ground for pressing the Court for a rule that would protect him from paying it a second time.

For the reasons above set forth I am of opinion that the rule *nisi* for setting aside the verdict granting a new trial should be discharged.

WILKINS, J., *dissentiente*.—With a view to materials for the opinion that it is my duty to deliver in this case, I had made extracts from *Comyn* and *Shepherd* on the point of the principles of construction of obligations, and the conditions of them; but it would be a mere waste of words and time to comment on them, for all the authorities, without exception, recognize the common sense rule that the intention is to be gathered from within the four corners of the instrument as a

whole, with the light of surrounding circumstances shed over it is, irrespective of the mere words, the pole star to guide the judicial course. Thus instructed, I read and endeavor to interpret the meaning of the obligors and obligees, parties named in the bond in question. To my mind their meaning is transparent, that the instrument (bond and condition) was understood, at the time of its execution, to be the several bond of each one of the obligors. Of the condition as regards *Forman* I shall speak presently. As respects every one of the other obligors, it is his bond in the penal sum of \$40,000, conditioned up to the pecuniary limit of \$8,000 but not beyond it, to indemnify the obligee in respect of *Forman* in manner set forth in the condition.

The instrument shows that *Forman's* relation to the obligee is that of a principal who has taken an office under that obligee; and it also shows that the relation under the instrument of each and every obligor to the obligee is that of a surety for *Forman*. The first part of the recital conclusively carries on its face an acknowledgment by the obligee (which I shall henceforth speak of as "the company"), that the execution of the bond was the result of a previous arrangement between *Forman* and the company, and that that arrangement is embodied and expressed in the condition. The first recital in express terms states a request made to the company by *Forman*, and the consent of the company to that request. What was that request so made and so accepted? It was that the company would accept from *Forman* a renewed security by his giving, not *the* bond, but *a* bond for \$40,000 with five sureties. This, in connection with what immediately follows, excludes from this case the possibility of the company, at the time of the execution of the bond, having been ignorant of the matter of this and of the second recital. If they knew it, the fact of their knowledge, *per se*, and independently of every other consideration, makes the language of the recital the language of the company not less than that of each and every obligor. Now common sense and the ordinary experience of reasonable men, and especially of men who trade in money, shut out the hypothesis of the possibility of this company, especially after the request of *Forman* and their acceding to it, having been ignorant of the whole of the

recital when the bond was executed. They could not be held ignorant as a legal presumption, and we have no proof of their ignorance as a fact. We find many embarrassing cases in the *English* books, in relation to which the Court was obliged to say it does not follow from the mere fact of a particular recital in the condition of a bond that the obligee admitted the fact recited to be true; but every one of such cases is marked by a feature distinguishing it from this, viz., that the matter recited was not within the privity of the obligee. I subjoin notice of a case that illustrates the distinction,—*Edwards v. Brown et al.*, 3 Y. & I., 423, shows this, and shows also strikingly how the intention furnished by the recital was called in to aid the construction.

I often consult *Dane's Abridgement* with advantage. He says, vol 5, sec. 5, p. 176, "if a condition be doubtful, it is always construed most in favor of the obligor for whose benefit it is made, and most against the obligee." He adds, "otherwise of the parol part of a single bond" (mind he is not speaking of a bond with a condition), "for the words are his, but those of the condition are those of both parties." No doubt the general rule of construction is thus fully stated.

The second recital, immediately following on the recital which I have noticed, is in these words: "And whereas the said *Alexander Keith* and four others named have undertaken," (not by any necessary implication with *Forman*, for if that had been intended other language would probably have been used, most likely with the company for their very first step after assenting to *Forman's* request would be to obtain from his nominees an understanding to become a surety, and to a defined extent of obligation,) "to become bound," (in furtherance, of course, of the request and the acceptance,) "for the said *James Forman* as such sureties, that is to say, *A. K.* in the sum of \$5000," (*et sic de ceteris*) "on and by the above written bond or obligation." Thus by these significant and unmistakeable words the obliged company unquestionably had knowledge brought home to it that each and every one of these obligors—these accepted sureties—considered and understood at the execution of the bond that his individual obligation, as well as the joint obligation of them all, expressed in the bond thus referred to (not by implication but) by

express words, was and were qualified by this recital. The very principle of the decision in *Ingleby v. Swift*, 10 Bing., 84, seemingly relied on at the argument for the plaintiff, is in perfect accordance with the views I have expressed. Had the intention relied on in that case for moulding the words of the bond, (instead of being as it was, entirely doubtful or adverse,) been as transparent as it is here, the Court would not have hesitated a moment to bend the words to conform to it.

As to the duty and power of a Court to do this, I shall cite only one case from many that I have before me. It was noted at the argument. In *Collins et al. v. Prosser et al.*, 3 D. & R., 112, 1 B. & C., 602, S. C., in debt on bond whereby Sir N. C. G. S. W. and I. B. acknowledged themselves held and bound to the plaintiff in £1000 each, for which they bound themselves, and each of them for himself for the whole and entire sum of £1000 each, subject to a condition of all moneys received by him as treasurer for the county of *Middlesex*. Held that this was a several bond only, and that the obligees by renewing the seal of one obligor did not render it void as against the others." *Littledale* argued it was a joint and several bond, referring to the words after the penal sum, viz., "for which payment we bind ourselves and each of us." *Rogers, contra*, "The bond was several as to each of the parties executing it." *Bayley, J.*, "Where parties enter into a joint and several bond for payment of an entire sum of money, whatever discharges one of the obligors must discharge all." Here we see the case turned on the question. The learned Judge continued: "But I am satisfied this was a several and not a joint and several bond. It would work great hardship to allow the obligees the option of treating it as a joint and several bond." Now how did the learned Judge arrive at the conclusion that it was a several bond. The learned Judge decided that case and this, in these words: "The recital," he says, "in the condition shows that each of the parties intended to enter into a security as to a specific limited sum, setting the sum opposite to some of the names is decisive as to that." Again: "It is quite manifest neither of these obligors intended to be bound beyond £1000." The learned Judge thus looked to the intention of the obligors. If we do

the same *cadit questio*. I have sufficiently noticed this case for my purpose. Whoever reads it will perceive that it was on all fours with this case, and that it is not merely in principle but in circumstances, as if made to decide the question before us. The intention of the obligors to be severally bound and each in a specific limited sum, is much more perspicuous in the case before us than it is in *Collins et al. v. Prosser et al.* It is as certain as words can make anything.

To notice the effect of this construction as regards *Forman* could be attended with no conceivable difficulty. If it were, the authority just cited will be found to decide that question also.

My opinion has been from the first, and is that our common law jurisdiction is sufficient to dispose of this case, and ought to dispose of it. I think the verdict should be set aside.

HARVEY v. COTTER.

W. M. C. becoming insolvent, his estate, under the provisions of the Insolvent Act was placed in the hands of the official assignee. Subsequently, at the request of his creditors, the assignee allowed him to resume possession of the goods and to sell them for their benefit. No deed of composition was entered into, nor was there any transfer of the goods to W. M. C. nor any discharge given him. After they had been some time in his possession, the defendant, as City Marshal, acting under an execution at the suit of T. J. W., one of the creditors, seized and sold a portion of the goods. The assignee thereupon sued him for trespass.

Held, that the seizure and sale were illegal, the goods being still in the possession of the assignee, and that defendant was liable in damages.

DESBARRES, J., now, (February 4th, 1873,) delivered the judgment of the Court:—

This was an action brought by the plaintiff as official assignee, appointed under the *Insolvent Act of 1869*, of the estate of *William M. Carey* an insolvent, against the defendant for seizing and selling under an execution issued out of the City Court against the insolvent at the suit of *Thomas J. Wallace*, and another part of the goods claimed by the plaintiff under the deed of assignment executed by the insolvent. The case was referred to the arbitrament of *John S. D. Thompson*, a barrister of this Court, who made his award therein in the form of a special case for the opinion of the Court, under

chap. 146, sec. 8, of the *Revised Statutes*. It was argued before us at the last *December* term by *Mr. Ervin*, counsel for the plaintiff, and judgment was reserved for want of time to dispose of it. Having since considered the matters submitted to us by the arbitrator, I will now proceed to state the conclusion to which I have arrived on the facts reported by the arbitrator in his award, which are to the following effect, viz.: That the plaintiff took an inventory of the insolvent's property, both real and personal, and advertized the personal property, consisting of cloths and ready-made clothing, for sale by auction. he being then in possession as such assignee, and holding the keys of the shop in which the goods were stored; that at the first meeting of his creditors the insolvent proposed to pay them by instalments, viz., one dollar in the pound in cash, one dollar in the pound in three months, and the balance of two dollars in the pound in twelve months, leaving the effects in the hands of the assignee; that the creditors did not at that time take any action on the proposition, but shortly before the time appointed for the sale of the goods at auction the plaintiff as assignee received a requisition signed by more than two-thirds of the creditors in number and amount, expressing a desire and consent on their part that the insolvent should himself make sale of the goods on hand, collect his debts, and pay the creditors by instalments of three, six and twelve months, so as to prevent a sacrifice of the stock; on reading the requisition on or about the 7th *February*, 1871, the plaintiff gave *Carey* the possession of all the personal property, to enable him to realize funds to make the offered payments; *Carey* held the goods for nearly a year, during which time he moved them to other premises and offered them for sale in his shop in the usual way, but effected no sales; *Carey's* real estate in the meantime was let and the assignee held the assignment and other proceedings in insolvency in full force until payments promised by *Carey* should be made; after the expiration of twelve months, as *Carey* had failed to pay any of the instalments, the plaintiff as assignee, sold all the effects remaining in his establishment, and proceeded with the settlement of the estate, which has not yet been completed. Among the creditors of *Carey* was the firm of *Thomas J. Wallace* and *William A. Wallace*, to whom he

owed \$48; their names did not appear in the schedule of creditors, and they were not notified by the assignee of the proceedings in insolvency otherwise than by a general advertisement. About two months after *Carey* had received back his goods under the arrangement with his creditors, the Messrs. *Wallace*, sued him and recovered judgment. *Mr. Thomas J. Wallace* being then aware of the proceedings in insolvency, inquired of plaintiff as assignee the position of the insolvent's affairs, and was told by plaintiff that *Carey* had promised to pay by instalments, and that his goods had been returned to him to enable him to do so. *Mr. Wallace* then issued an execution, as before stated, in the City Court, under which defendant as City Marshal seized and sold part of the cloths and clothing which *Carey* had assigned in the first instance, and which had been handed back to him, and which he then held under the arrangement made. The defendant had notice in writing before the sale, and was indemnified. The arbitrator awarded that if the Court should decide that the plaintiff was entitled to recover under this state of facts, the damages to which he was entitled for the trespasses sued for in this action amounted to \$65.

The question that arises here is whether the re-delivery of the goods by the plaintiff to the insolvent, under the circumstances thus reported, operated as a surrender to him of the right of property which the plaintiff had in them under the assignment, or as an authority only to sell the goods for and on behalf of, and for the benefit of the creditors, to prevent a sacrifice of them at public auction. No deed of composition was entered into, and no re-transfer made by the plaintiff to re-invest the property in, and no discharge given to the insolvent, and as the right of property in his real estate still remained in the plaintiff, and the proceedings in insolvency were still pending and only for a time suspended, there is nothing to show that the plaintiff parted with the right of property which he derived under the assignment. No part of the goods were sold by *Carey*, and the fact of the plaintiff having since sold all that remained after the sale made by defendant, warrants the presumption that the return of the goods to *Carey* was not intended to restore to him the right of property he had in them before the assignment was made,

but for a very different purpose. Section 35 of the Act of 1869 provides that if at the meeting of the creditors the insolvent shall make an offer of composition, and such offer be approved of by the creditors, they may make such order as they may deem expedient, either for suspending the disposal of the estate, and all or any proceedings tending thereto, for such time as may be fixed by such meeting, or for any other purpose. Now it appears to me that nothing more was done or intended by handing back the goods to *Carey* than to suspend the disposal of them by the assignee for the time fixed upon by the creditors giving to *Carey* a right to sell in the meantime at private sale for the benefit of the creditors, the assignee still retaining the right of property in them under the assignment. That to my mind is the only inference to be drawn from the facts, and therefore I am of opinion that the seizure and sale of a portion of the goods by the defendant under the execution of the Messrs. *Wallace* was an illegal act for which he must be held responsible. To suppose that the creditors would ever consent to hand back to the insolvent the goods as his own, without any security for payment, would be to suppose what is not at all probable, that the creditors forgot or were entirely regardless of their interests.

Section 41 of the Act directs that the assignee shall wind up the affairs of the insolvent by the sale in a *prudent* manner of all his property, provided that such sale and the terms and conditions thereof be first approved at a meeting of the creditors. The creditors, it appears, did not approve of the sale of the insolvent's goods at public auction. They were afraid the goods would be sacrificed, and they, as the language of their requisition expresses it, preferred to permit *Carey* to make sale of the goods if he could, not surely as his own, but as the goods of the assignee held for their benefit.

It appears from the arbitrator's report that the names of the Messrs. *Wallace* were not included in the schedule of creditors, and that they were not notified by the assignee of the proceedings in insolvency other than by the general advertisement, but as the assignee by section 69 of the Act was bound to reserve dividends for them out of the insolvent's estate, their interests were fully protected, and they, notwithstanding, stood on an equal footing with the rest of the

creditors, a position with which they ought to have been content; but if the course adopted in this case be sanctioned, they will receive the full amount of their claim, while the rest of the creditors will be obliged to receive just such a dividend as the estate will produce, which may not amount to half of their respective claims. This is against the policy and spirit of the *Insolvent Act of 1869*, which was intended to place all the creditors upon a just and equal footing. I am therefore of opinion that for the reasons given, and on the facts reported, the defendant was not justified in seizing and selling the goods in question under the execution placed in his hands, and that the plaintiff is therefore entitled to recover from him the amount awarded by the arbitrator as damages for such seizure.

CARVELL ET AL. v. WALLACE.

PLAINTIFF sued for goods sold and delivered. Defendant pleaded the Statute of Limitations. Plaintiff replied that at the time the action accrued defendant was absent from the Province, and that suit was brought when defendant came within the jurisdiction of the Court. Defendant demurred. The cause of action had accrued in Prince Edward Island, and it seemed that according to the laws of that Province the debt was barred by the statute, but was not barred by the Statutes of Nova Scotia.

Held, that admitting the debt to be out of date in Prince Edward Island, the plaintiff might nevertheless recover in Nova Scotia, as only the plaintiff's remedy was thereby barred, and the debt was not extinguished.

DESBARRES, J., now, (February 4th, 1873,) delivered the judgment of the Court:—

This was an action for goods sold and delivered, &c., to which defendant pleaded, 1st, never indebted; 2nd, that before action brought he satisfied and discharged the plaintiffs' claim by payment; 3rd, that the plaintiffs are not entitled to recover from defendant the sum named and claimed in the writ, for the reason that the interest charged upon the amount stated was usurious and contrary to law, and, 4th, that the cause of action alleged in the writ of the plaintiffs did not accrue within six years from the commencement of this suit. The plaintiff demurred to the third plea upon grounds to which it is unnecessary to refer, *Mr. Wallace* at the argument having abandoned that plea as one which could not be sus-

tained. To the fourth plea the plaintiff replied that at the time the action accrued the defendant was absent from and out of the Province of *Nova Scotia*, and this suit was brought after the defendant came within the Province and within the jurisdiction of this Court. The defendant demurred to this replication on the following grounds: 1st, that it was no answer to defendant's said plea; 2nd, that the plaintiffs should have alleged in their replication that the cause of action alleged in the plaintiffs' writ did accrue within six years, and not having made such allegation they admit the defendant's plea which is an answer to the plaintiffs' writ; 3rd, that plaintiffs should have shown that when defendant came to *Nova Scotia* from *Prince Edward Island*, where the cause of action accrued, the *Statute of Limitations* had not commenced to run, and that not having done so they admit that it had commenced to operate, and that more than six years had elapsed since it so began to run. There was a joinder by the plaintiffs on this demurrer, alleging their replication to be good in substance. The plaintiffs' bill of particulars indorsed on the writ is dated 30th Oct., 1865, and the writ was issued on the 18th Dec., 1871, from which it would appear that the defendant's fourth plea will operate as a bar to the action if the plaintiffs' replication to that plea cannot be sustained. As the bill of particulars indorsed on the writ states the amount claimed by plaintiffs to be due in *Prince Edward Island* currency, the inference to be drawn from that fact would be that the debt was contracted in that Province, but as there is no allegation in the pleadings to that effect, we must consider the debt to have been contracted in *Nova Scotia*, and so viewing it inquire whether under the pleadings as they exist the debt is recoverable or barred by our *Statute of Limitations*, chap. 154, R. S. The plaintiffs, it is true, do not allege in their replication that the cause of action did accrue within six years, the time prescribed in the act, before the writ was issued, but they do allege in the usual form that at the time the action accrued the defendant was out of the Province, and that allegation is sufficient under the ninth or saving clause of the act to protect them against its operation, though the defendant may have remained out of the Province for a longer period than six years.

I may here remark that the words "out of the Province" in the ninth section of chapter 154, *Revised Statutes*, are, as I think, to be looked upon here as equivalent to the words "beyond the seas" in the *English* acts; see 32, *Law & Eq. R.*, 91, and 1 *M. & W.*, 74. Viewing the case in the light I have mentioned there can, it appears to me, be no difficulty in deciding it. But as the object of the defendant evidently was to raise the question as to his liability upon the assumption that the debt was in point of fact contracted in *P. E. Island*, and barred by the *Statute of Limitations* of that Province, though not so alleged before this suit was brought, and as both parties treated this case at the argument as involving this question, and cited cases on both sides bearing on that question, we must, it appears to me, regard it as one of that character, and say whether the plaintiffs' replication to the fourth plea, on which the defendant alone relies, can under such circumstances be upheld.

It will be found on examination of the cases, that the law bearing on the point raised has been pretty well settled, so settled, that to my mind there can be but little reason for doubt on the subject. The leading case bearing on this point is that of *Williams v. Jones*, 13 East., 439. That was an action of assumpsit for money laid out and expended by plaintiff, and for work and labor as attorney of defendant in prosecuting and defending suits in the Supreme Court of Judicature at *Fort William* in *Bengal*, and other courts beyond the seas in the *East Indies*. Defendant pleaded as in this case *actio non accrevit*, &c., to which defendant plaintiff replied that defendant before and at the time when, &c. was beyond the seas, and that plaintiff commenced the suit within six years after his return. Defendant rejoined that before and at and long after the making of the promises in the declaration, defendant and plaintiff were subjects of the king and residing at *Bengal*, within the jurisdiction of the Supreme Court there, and that the several promises were wholly made, and the several causes of action wholly accrued to the plaintiff at *Bengal*, and within said jurisdiction, and that defendant continued resident at *Bengal*, and within the jurisdiction of said Supreme Court, more than six years after the making of the promises, and that no suit was com-

menced by plaintiff against him upon said promises at any time within six years next after making the same. To this rejoinder the plaintiff demurred, and it was held that though the cause of action accrued within the jurisdiction of the Supreme Court at *Calcutta* while both parties were residing there, and by the king's charter granted in pursuance of the statute of *Geo. III.*, chap. 63, the Court was authorized to exercise the same jurisdiction in civil causes as was exercised by the Court of King's Bench in *England* by the common law, assuming that by such authority the provisions of the *Statutes of Limitations*, 21 James I., chap. 16, sec. 7, and 4 *Ann*, chap. 16, sec. 19, were transferred to *India* as part of the law of *England*, auxiliary to the common law, yet by the express terms of the savings in those statutes as applicable to the Courts in *England*, the plaintiff's right of action upon an assumpsit was saved if he having returned home before the plaintiff commenced such action within six years after the defendant's return home, though more than six years had elapsed in *India* after the cause of action had accrued there, and during the defendant's stay within the jurisdiction of the Court of that country. The doctrine laid down by Lord *Ellenborough* and the rest of the Judges in that case was that as there was nothing in the law which extinguished the debt, and nothing was stated to show that it was extinguished by the law of the country where it was contracted and where the parties resided at the time, the *Statute of Limitations* only barred the plaintiff's remedy, not the debt.

The same question as is involved here was raised on demurrer in *Bryson v. Graham*, Thomp. Reps., 271, and decided in this Court in 1848, where it was held that though a debt contracted in *Scotland* would have been barred by the *Scotch Prescription Act* from lapse of time, yet if the defendant came to this Province, an action was maintainable for its recovery here. Mr. Justice *Bliss* who delivered the judgment of the Court in that case, remarked that in *April* term, 1834, in the case of *Marsh v. Hoyne*, it had been fully considered how far the *English Statute of Limitations* affected a plaintiff suing here for a debt contracted in *England* between parties there resident and prescribed by that statute, and that the Court decided "that a debt contracted in *England*

between parties there residing was not prescribed in *Nova Scotia*, provided the action was brought within six years after the plaintiff's first coming into this Province; that the plaintiff's remedy only was barred in *England*, but the debt was still subsisting and recoverable here, adding that the case of *Williams v. Jones* was then relied upon in the judgment given as decisive." As I think, we too must rely upon it as conclusive in the case before us. In *Huber v. Steiner*, 2 Bing., N. C., 202, assumpsit on promissory notes made by defendant, the *Statute of Limitations* was pleaded after the plea of the general issue, and 3dly that at the time of the making of the promissory notes the plaintiff and defendant were merchants and traders domiciled and carrying on business in *France*, and that by the law of *France*, all actions on promissory notes are and were wholly barred, precluded and estopped after five years, &c. *Tindall*, Ch. J., says: "We take it to be clearly established and recognized as part of the law of *England* by various decisions, that if the prescription of the *French* law which has been opposed to the plaintiff in the present case is no more than a limitation of the time within which the action upon the note must be brought in the *French* courts, it will not form a bar to the right of action in our *English* courts, but the question whether the action is brought within due and proper time must be governed by the *English* statute."

I come now to the case of *Bulger v. Roche*, 11 Pick., 36, decided in 1831, in which *Shaw*, Ch. J., delivered the opinion of the Court, which shows that the established doctrine of the *English* courts in the question under consideration is held in the Supreme Court of *Massachusetts*. That was an action on a promissory note given by defendant to plaintiff here in *Halifax*, dated 1st Feb., 1831. Pleas, 1st, general issue; 2nd, *actio non accrevit*, &c.; 3rd, *non assumpsit infra sex annos*. The replication to the second plea was that at the time when the debt accrued the plaintiff was beyond the sea without any of the *United States*, to wit, at *Halifax*, and there lived until he afterwards, viz., on 1st June, 1829, came to the *United States*, and that within six years after his coming into the *United States*, viz., on the 8th Aug., 1829, he commenced the suit. The defendant rejoined that plaintiff and defendant were both aliens, and were at the time when the action accrued inhabit-

ants of *Halifax*, living under the laws of *Nova Scotia*, and continued to be inhabitants of and residents in that Province for more than six years next ensuing, to wit, to 1st *March*, 1827, and by the laws of *Nova Scotia* in force at the time when the supposed cause of action accrued and ever since, all actions in the case upon promises are barred unless commenced within six years after the cause of action accrued, and that supposed cause of action accrued to plaintiff at *Halifax* on 5th *Feb.*, 1821, and not afterwards. Demurrer to rejoinder, Held that the debt being contracted in a foreign country between the subjects of that country, who remained there until it became barred by the *Statute of Limitations* of such country, their *Statute of Limitations* could not be pleaded in bar to an action for the debt brought within six years after parties came into the Commonwealth.

The next and last case I shall refer to is that of *Harris et al. v. Quine*, 4 L. R., Q. B., 653, decided in 1869. This is a case which if it stood alone would to my mind be conclusive on the question raised here. The plaintiffs in that suit were attorneys in partnership, in the *Isle of Man*, and retained by the defendant in 1858 to conduct a suit in one of the *Manx* courts, in which he was defendant. The suit was dismissed in 1861. The plaintiff appealed in that suit to a superior court, and the plaintiffs continued to act for the defendant, and conducted the appeal on his behalf to *October*, 1862. The plaintiffs brought an action to recover the amount of their bill of costs in one of the *Manx* courts against defendant more than three years after *October*, 1862, that being the time prescribed by the *Manx Statute of Limitations*, and the Court decided that the action was barred by the statute. The plaintiff commenced another action in the Court of Queen's Bench in *January*, 1868, to which defendant pleaded, 1st, the judgment of the *Manx* Court; 2nd, the *English Statute of Limitations*. Held that as the *Manx* statute barred the remedy only, and did not extinguish the debt, the judgment of the *Manx* Court was no bar; so that if there had ever been a judgment in favor of the defendant on a plea of the *Statute of Limitations* in *P. E. Island* for the same debt, the plaintiff it seems could still under this authority have maintained an action against defendant here at any time

within six years after his coming to this Province. We all think there must be judgment for the plaintiff on the demurrer with costs.

BUTLER ET AL. v. EVANS.

DEFENDANT pleaded as a set-off to plaintiff's claim a bill of exchange accepted by plaintiff and endorsed to him. Plaintiff replied that the bill at the time of its acceptance and endorsement was not stamped according to law. Defendant demurred.

Held, that the replication was good, and that if the stamps were affixed after the acceptance or endorsement, it was for defendant to rejoin the facts which justified him in subsequently affixing them.

RITCHIE, E. J., now, (February 4th, 1873,) delivered the judgment of the Court as follows :—

The defendant in this case pleaded as a set-off to the plaintiffs' claim a bill of exchange accepted by the plaintiffs and endorsed to the defendant. To this the plaintiff replied that the bill was not stamped according to law at the time of the indorsement, and also that at the time of the alleged acceptance it was not stamped. To these replications the defendant has demurred.

Whether a violation of the *Stamp Act*, whereby an instrument is rendered invalid, need or need not be pleaded, is not at present for our consideration, having been in this case pleaded, the question for us is has it been properly pleaded?

The *English* statutes on the subjects differ from ours, and the cases cited in support of the demurrer are, I think, inapplicable; the statutes under which those decisions took place prohibit the unstamped instrument from being given in evidence, and permit the holder of it to have it stamped on payment of a penalty at any time before it is offered in evidence, while our statute declares the instrument not stamped to be invalid and does not confer on the holder a right to have it subsequently stamped as a matter of right, but only permits it to be done under certain circumstances, of which he would be required to give evidence on the trial. I may also add that in the cases referred to the question was raised on special demurrer, and our *Practice Act* declares that no pleading shall be deemed insufficient for any defect formerly objectionable on special demurrer only. *Dawson v. McDonald*,

2 M. & W., 26 (1836); *Howard v. Smith*, 4 Bing., N. C., 684 (1838); and *Beardly v. Beardly*, 3 Dow. & Lowndes, 476 (1849), were all cases of special demurrer and the decisions in all of them had reference to those portions of the *English* statutes in which they differ from ours.

I think the replications are good, and if the stamps were put on after the acceptance or endorsement it is for the defendant to rejoin the facts, if they exist, which justified him in subsequently affixing them. Judgment therefore will be for the plaintiffs.

CONDON ET AL. v. DAVIS ET AL.

PLAINTIFFS sought to recover possession of a lot of land—portion of an island that had been granted to several persons, their grand-father being one of the grantees, but there was no evidence to connect him with the particular lot in question. He held no assignment of it, and had never claimed it in his life-time though he had lived forty years after the passing of the grant, and many years after those under whom defendants claimed had been living upon it. The defendants had been in possession of the lot for from sixty to eighty years previous to action brought.

Held, that the verdict for plaintiffs shou'd be set aside and a new trial had.

RITCHIE, E. J., now, (February 4th, 1873,) delivered the judgment of the Court:—

The plaintiffs in this action sought to recover possession of a lot of land on *Brier Island*, in the county of *Digby*, under a grant from the crown which passed in 1784. Their grand-father *Massels* was one of the grantees named in the grant, which comprised the whole of the Island, but gave no particular lot or portion of it to any of the grantees. It referred to a plan annexed, but no plan was attached to the grant when produced, and there is no evidence that I can find on the minutes, which connects the ancestor of the plaintiffs with the particular lot in question, other than that it has been called the *Massels* lot. There is no evidence that it was assigned to him in any partition of the Island among the grantees, or that he was ever in possession of it, or that he in his lifetime ever claimed it, and he lived forty years after the passing of the grant, and many years after those under whom the defendants claim had entered and were living upon it; and when long after his death the plaintiffs made a claim to

it, about forty years ago, their claim was resisted and they abandoned it.

But if we were to assume that a title had been made out in *Massels* the grantee, the evidence establishes a possession of the lot by the defendants and those from whom they claim for from sixty to eighty years, of such a character as would deprive the plaintiffs of a right to the lot at this late day. According to the plaintiffs and their witnesses, *Mrs. Davis*, the mother of the defendants, was on the lot in 1814, had built a house on it, and cleared four acres, and after living many years in the house, on leaving it about twenty years ago, leased it to a tenant. The defendants have made clearings on the lot, eight or ten or more acres, and have cut wood over the lot every year since 1814; this is the testimony of a witness on the part of the defendants, who stated also that he has heard *Davis* one of the defendants say that his mother had writings from *McElliny* that he gave her the lot, and that the witness had known this for fifty years. One of the plaintiffs, *William Massels*, testified that two years after the death of his grandfather which took place in 1829, he went to *Brier Island*, and after consulting a lawyer in relation to the property, he had a document prepared and served on *Mrs. Davis*, demanding possession, and that he then saw her on the lot and demanded possession of it as one of the heirs of old *Mr. Massels*, and asked if she had a title to it, when she replied that she had a title from *McElliny*, and a letter of occupation from the Governor at *Halifax*. No suit was then brought or other proceeding taken to dispossess her.

Had the case stopped here the plaintiff would in my opinion have totally failed in establishing a right to recover in this action, but the evidence on the part of the defendants is of the most conclusive character. *Edward Davis*, one of the defendants, seventy-two years of age, says that his father having died shortly before, his mother built on the lot in question; that he himself built on another part of the lot in 1817 and made a clearing; that from 17 to 20 acres have been cleared in one part and three in another, two miles apart; and it is in evidence that they had made roads across the lots for the purpose of hauling manure to the cleared fields, that wood

has been cut every year over the whole lot, and two surveys have been made by them, one 40, the other 44 years ago.

Even on the score of title the defendants seem to occupy at least as good a position as the plaintiffs, for, while it was in evidence that the lot was called the *Massels* lot, it was also proved that it had been called the *McEllinny* lot, and on the plan dated 1790, produced by the plaintiffs, there was the name of *McEllinny* and not that of *Massels*.

The defendants put in evidence a document which is referred to as a power of attorney from *Nancy McEllinny* to *Edward Davis*, the father of the defendants, which is in fact more than an ordinary power of attorney, and we are justified in inferring from the evidence that it was under this document old *Edward Davis* originally claimed, and his widow and children went into possession as far back at least as 1810. It is under seal, and authorized *Edward Davis* to enter into and keep possession of 200 acres on *Brier Island*, Lot No. 4, (being the lot now claimed by plaintiffs,) and to hold the same by himself and his lawful heirs until the said *Nancy McEllinny* should call for the land. It is dated in 1789, upwards of eighty years ago, a year before the date of the plan in evidence, and only five years after the passing of the grant. This, if it did not give the defendant a good documentary title, gave a color to their possession of the whole lot for upwards of sixty years. Independently of this document there is conclusive evidence that *Mrs. Davis*, the mother of defendants, claimed the whole lot forty years ago, and that plaintiffs knew it, that is from the time they demanded possession and it was refused, with a distinct claim on her part, and a denial of their right to it as the heirs of old *Mr. Massels*.

The principle on which a party in possession of land under color of title is held to have entered on the whole lot described in the deed is, that there is thereby notice, or at least constructive notice, to the true owner that he claims the whole lot. Here we have distinct evidence that actual notice was given to the plaintiffs if they had been the owners, that the whole lot on which the ancestor of the defendants then lived was claimed by her adversely to them, and since then for forty years her possession and that of her heirs and devisee has been notorious and hostile to them. After this demand, and

the continued possession of the defendants. the plaintiffs became disseised and dispossessed of the whole lot, for this takes place when the parties in possession openly repudiate the rights of another and claim title to the land ; 2 *Washburn's Real Property*, 402 ; *Bradstreet v. Peters*, 5 Peters, 412 ; *Parker v. Proprietor of Locks, &c.*, 3 Met., 101 ; see also *Co. Litt.*, 153. To constitute a disseisin it is not necessary at the present day to prove a forcible expulsion of the owner, but the intention to hold the estate must be manifest. Adverse entry and possession claiming the whole lot constitute a disseisin. Possession notorious and adverse is equivalent to actual expulsion ; it will be sufficient if there has been a notorious claim of the land within the knowledge of the adverse claimant, and without interruption or an adverse entry by him.

I am therefore of opinion that under the evidence adduced the verdict should have been for the defendants, and that there should be a new trial.

McNUTT v. McDONALD.

PLAINTIFF was book-keeper for defendant, and claimed a balance of salary due him, alleging that the hiring was for \$1600 a year. Defendant contended that plaintiff's salary was only \$1000, which had been paid him in full. Their respective statements as to the terms agreed upon between them were very conflicting, but in corroboration of defendant's was the fact that at the end of the year for which the salary was to be paid the plaintiff entered it in the books as only \$1000. The jury found for plaintiff.

Held, that there should be a new trial.

RITCHIE, E. J., now, (February 4th, 1873,) delivered the judgment of the Court as follows :—

This action was brought to recover from the defendant a balance which the plaintiff claims to be due him for services during the year 1870 as book-keeper and managing clerk at the rate of \$1600 a year. The services for that year are not disputed, and the only question involved is the rate of wages. The defendant contends that the hiring was for \$1000, and that he has paid the plaintiff in full ; the balance claimed by the plaintiff is \$755.47.

It would appear from the evidence that the clerks in the employ of the defendant were engaged by the year at stated

salaries or wages, and that it was his custom at the end of the year to make an additional allowance or gratuity to them or some of them as his business prospered or he might think they merited. This had been the case in former years with respect to the plaintiff. In 1867 he had received at the rate of \$600. In 1868 he received \$800. In 1869 the plaintiff says no agreement was made, and he was paid \$1000, and the defendant then told him he would have doubled the advance if his business would have allowed it. No agreement was made for 1870 before or at the commencement of that year, the plaintiff continuing his services under the previous arrangement, according to his own showing, up to about the end of *April*, when he having received an offer of £400 from a person in *Charlottetown*, communicated it to the defendant, who told him he would not treat him fairly if he left him, that he could not do without him, and then the plaintiff alleges that it was arranged that he should have \$1600 a year, with \$400 additional if the net profits reached \$10,000. At the close of the year a difference arose between them, the plaintiff contending that the offer related to the year 1870, which the defendant disputed, but, according to the testimony of the plaintiff, he said that though he intended the offer to be prospective, if the defendant understood it otherwise, he supposed it must be so, and hoped the profits of the year would allow of his paying him. The defendant denies the correctness of these statements of the plaintiff, and he says that when he was apprised of the *Charlottetown* offer he told the plaintiff he would allow him \$1600 if the profits of the business reached \$8000, to which the plaintiff assented. When the books were made up the defendant handed to plaintiff a list of the salaries to be entered, and among them his own at \$1000. He states that he then asked what it meant, and suggested that defendant could put the account properly in his private ledger, to which he says plaintiff replied that could be done at any time. The plaintiff then made this entry in his account, —“By services, \$1000,” and the account was so closed, but he says he expected defendant to give him a cheque for \$600. The profits for the year 1870 were much less than for the 1869; it was supposed, the plaintiff says, that they would reach \$10,000, he did not think they amounted to half that

sum,—the actual amount was \$3206 as entered by him in the books. The defendant says the entry of \$1000 as his salary was made as the actual amount due; that when plaintiff saw the result of the year's business he acquiesced in the \$1000, and made the entry in good faith. The plaintiff goes on to say that he was discharged on the 17th *January*, 1871, and had received previous to the commencement of this suit \$1250, being thus overpaid \$250 if the defendant's account of the terms of the hiring is to be adopted, and leaving a balance of \$350 still due if the plaintiff's statements are to be accepted; but the jury have found a verdict for \$644.43. They have, I presume, refused to give the defendant credit for the amount paid to *Mr. Garvey*, the plaintiff's attorney; this I think they were not justified in doing, as the plaintiff had no right to apportion that payment in liquidation of any other than this debt, none other having been shown to exist, and nothing in the evidence indicates that it was paid on any other account. The verdict, therefore, must be set aside or reduced, but, where the jury have gone so far astray, it is not satisfactory to adopt their verdict in a case where it appears to me the weight of evidence is rather with the defendant.

The plaintiff admits that he commenced the services for 1870 on the same terms as for the year 1869, when at most he could only legally claim \$800, any advance being at the option of the defendant, and the hiring being for a year as he contends, the defendant was entitled to retain him in his employment independently of any agreement in *April*, when one-third of the year had passed. It does not seem reasonable that the plaintiff's wages should gratuitously be doubled irrespective of the amount of profits on the year's business for that current year, and the defendant's statements regarding the hiring seem more probable than those of the plaintiff, but differing as they do on this point there is a strong corroboration of the defendant's account of it, when at the close of the year the entry is made by the defendant in accordance with the agreement as stated by the plaintiff, and in that way reduced to writing, the effect of which is to be destroyed by the verbal statements of the plaintiff the truth of which is denied by the defendant. I think, therefore, the safer course is to remit the case to another trial.

LECAIN v. HOSTERMAN ET AL.

PLAINTIFF sought to set aside the return made in an action of partition by the commissioners duly appointed upon the ground that they had improperly allotted to one of the partitioners a lot of land below its value, and below the price plaintiff had notified them he would pay for it. The evidence in support of plaintiff's claim consisted simply in the fact that having by some means obtained a knowledge of the decision of the commissioners before they signed their return, he had offered them \$2000 more for the lot in question than the value they had placed upon it.

Held, no ground for disturbing the return.

McCULLY, J., now, (February 4th, 1873,) delivered the judgment of the Court as follows:—

This was the case of a rule *nisi* sued out by plaintiff, calling upon defendants to show cause why the return made in an action of partition by commissioners duly appointed under chapter 139, *Revised Statutes*, should not be set aside upon several grounds set out in the rule. The rule *nisi* does not ask in the terms of the statute, section 27, that "the case should be committed anew to other commissioners to be appointed," as I think it should have done, and as probably the plaintiff if he succeeded intended should be done. The case was argued during the extended *Michaelmas* term by Messrs. *Henry*, Q. C., and *Gray*, for plaintiff, and by Messrs. *Blanchard*, Q. C., and *Ritchie*, Q. C., for defendants.

The argument was chiefly confined to the ground of objection under the third head, namely, that the commissioners have improperly allotted to *John E. Hosterman* a lot of land below its value, and below the price plaintiff notified them he would pay for it. By the 19th section of the chapter these commissioners are required before proceeding to the execution of their duties to be sworn before any justice faithfully and impartially to perform the same. Assuming that this has been done, as we must assume at this stage of the proceedings, unless the Court shall be of opinion that owing to mistakes committed, or corruption, there has been a miscarriage of justice, the return of the commissioners ought not to be set aside. Without descending to particulars, or referring to the perhaps accidental manner in which plaintiff became acquainted with the views and opinions of the commissioners before signing their return, it may suffice for the present purpose to say that the strength

of plaintiff's case consists in the fact that he had signified to the commissioners before they had signed their return that he would be willing to give more by \$2000 for the portion of land, No. 4, valued by them at \$25,000, and now allotted to *John E. Hosterman* under the 22nd section of the chapter, than the amount of value at which it is estimated in the return made, which allots it to him (*Hosterman*).

After carefully reading over the papers referred to in the rule nisi, that is to say, such of them as bear upon the immediate controversy, the affidavits of plaintiff and his attorney, and that of the two commissioners in reply, it clearly appears what it is that takes this case out of the general principle that was pressed upon the Court by plaintiff from his standpoint. The commissioners at plaintiff's instance, they say, increased their valuation of No. 4 by \$2000. No. 4 being the homestead of *John E. Hosterman*, the eldest son of his father the late *Thomas Hosterman*, defendants claiming under a younger brother, and this No. 4 having had erected upon it a nail factory (driven by a water power). The case, I think, falls to some extent within the principles that obtained where heir-looms and like property have been appraised for sale under the statutes of distribution and of wills, and executors allow members of the family to take them at the lowest valuation, and are protected accordingly.

All the statute requires is, "that the party to whom the portion incapable of division may be set off, and who will accept it, shall pay or secure to any one or more of the others such sums of money as the commissioners shall award;" and without admitting that the valuation contemplated is not subject to the revision of this Court, I am nevertheless of opinion that a much stronger case than that made out would be required to induce a court to set this valuation aside. Except the unsupported affidavits of plaintiff and his attorney of what the former was prepared to give, there is no proof whatever that the commissioners have erred in their estimate of value.

If these commissioners had grossly erred in the estimate placed upon lot No. 4, this Court would have given due weight to the opinions and estimates of judicious, disinterested men, had their affidavits been procured by plaintiff and read

as the grounds of his rule *nisi*. Suppose that instead of the additional sum of \$2000 which he swears he would have given, he had offered \$10,000 additional, was it imperative on the commissioners to regard his offer as the true value, and under oath, contrary to their individual convictions, to put this lot 4 down at \$35,000 instead of \$25,000? I think not. If that was the meaning of the Legislature it is not so expressed. The opinion of the Court is that if the commissioners have tendered this lot No. 4 to *John E. Hosterman* at a fair marketable valuation, they have complied with the requirements of the statute and discharged their duty. Two of the commissioners, Montgomery and Nash—Kaye being absent—in an affidavit in reply to plaintiff, swear "that after mature deliberation they all three concurred in estimating the value of said lot 4 at \$25,000, which they consider its full value." Plaintiff on this point swears that he was and still is convinced that lot 4 is worth fully \$27,000, and that he would take the other lots as valued, and would give, and was prepared to pay \$27,000 for lot 4, if *Hosterman* refused. This is the whole proof of value offered. Had the statute prescribed as the mode of disposing of lands unfit for division that they should be allotted to the party who would offer the highest price, then the rich man would always, if so inclined, be able to dispossess the poorer occupant, no matter what his attachments to the ancestral home, or what the loss or inconvenience of removing expensive machinery in a factory, however extensive, unattached to the freehold. Chapter 16, Acts of 1866, provides for a sale in certain cases, but only where none of the parties interested are willing to accept at the valuation made, or infancy, absence or other incapacity defeats on of chapter 139. But if we were to adopt plain- and set this return aside on the grounds set forth, be virtually adopting the provisions of a statute never intended for a case like the present, as by nifestly appears. The rule *nisi* must, therefore, be

BAIRD v. ANDERSON ET AL.

DEFENDANTS had dealt with H. & Co. for some time, not knowing them to be agents for plaintiff, but considering them as principals, the bills rendered to them by H. & Co. being always in their own name. Having purchased a quantity of plaintiff's goods from H. & Co. a bill was rendered to them in H. & Co's name but subsequently another bill was sent in the name of plaintiff. H. & Co became insolvent after delivery of the goods, and defendants did not pay them for them, as they had a contra account. On being sued by plaintiff they pleaded the contra account, and paid the difference into Court.

The evidence at the trial was very contradictory and conflicting, but the jury found for defendants.

Held, that the verdict should not be disturbed, and that the payment into Court was no admission of defendants' liability beyond the amount paid in.

MCCULLY, J., now, (February 4th, 1873,) delivered judgment of the Court as follows:—

This cause was tried before His Lordship the Chief Justice, April Sittings, 1872, and a verdict passed thereon for defendants. A rule *nisi* for a new trial was taken out under the statute and argued on the 26th December.

McDonald, Q. C., for plaintiff.

Blanchard, Q. C. and *Lynch* for defendants.

The rule was taken on the ground that the verdict was against law and evidence.

Not being aware that this rule *nisi* had been sued out, His Lordship did not report his charge. But as no exception was taken to it, I think the Court must now assume that the law applicable to the facts as disclosed by the minutes was correctly explained to the jury, and the presiding Judge having refused a rule *nisi* to set the verdict aside, he of course was not dissatisfied with the verdict as delivered.

The action was brought by plaintiff to recover the value of a number of casks of ale and porter purchased by defendants and delivered by the firm of *Hare & Co*. Plaintiffs resided in *Glasgow*; defendants in this city, as did also *Hare & Co*.

The plaintiff's witnesses,—*Wm. Hare* and a *Mr. Johnston*, his clerk, testified to a state of facts which, undenied or unqualified, made a complete case and one that would have entitled plaintiff to recover the amount claimed beyond all room for controversey. The substance of it was that *Hare & Co*. were mere commission merchants, a fact alleged to be generally

known ; that *Hare* became embarrassed in his business before the delivery of the goods, some two or three weeks,—*Hare* admits at least six. I think the bill for the goods had been rendered in their (*Hare & Co's*) name and another subsequently substituted.

But opposed to this the testimony on the part of defendants was contradictory and utterly inconsistent. The first words of *C. Anderson*, one of the defendants, are: "We have always dealt with *Hare & Co.* as principals; never knew they were dealing as agents; had no knowledge they were selling as such; bills always in their own names, &c. Other witnesses on the part of defendants spoke as to the original bill being in *Hare & Co.'s* name, testified that he sent for it, and subsequently rendered another bill in plaintiff's name. The evidence was contradictory and conflicting in almost every important feature of it, except as to the value of the goods and their delivery. But the jury having passed upon the facts as found for defendants, if the issues submitted were adapted to try the merits of the cause, it would be difficult now for this Court to interfere and set aside a verdict under such circumstances.

The defendants' pleas were, never indebted, an outstanding note of *Hare & Co.* made to them, overdue and dishonored, amounting to \$——, and a plea of payment into Court of \$58, which together would be a full discharge and answer, if *Hare & Co.* were principals and not agents. *Hare & Co.* were not in reality principals, as appears now, whatever they may have held themselves out to be, and whatever defendants may have supposed in consequence of the present or previous transactions they were. Upon this state of facts plaintiff's counsel contended that it was now open to him to raise the question that the verdict was contrary to law. And he relied upon the payment of money into Court as an admission of the contract as set out in plaintiff's writ, and if so, the note of *Hare & Co.*, he contended, could neither be a set off, nor a defence under defendants' plea. Defendants' pleas in bail contained the usual reservation, viz., except as to \$58, &c., and then followed the statutory plea. *Bullen & Leake*, 666, and *Day's C. L. P.*, 73, were cited; also *Story on Agency*, 506, and *7 C. B.*, 687. But the text of this case in no way assists him.

Fisher, 7779, gives the substance of it thus: "If a buyer purchases goods of a factor with the knowledge that he sells as factor and not as principal, the buyer cannot set off a debt due to him from the factor in an action for the price of the goods." But the jury have settled the facts the other way, if His Lordship directed them right, as we must assume he did.

As regards the effect of payment of money into Court, in *Taylor on Evidence*, 761, it is laid down, and the cases cited, that if the plaintiff seeks to recover any damage or debt beyond the sum paid into Court, he must prove not only that a larger sum was due, but also the existence of the contract on which he relies, as well as his separate right to sue on that contract. And see *Charles v. Branker*; 11 M. & W., 743, that the joint payment of money into Court by two defendants under the indebtedness counts is no acknowledgment of their co-partnership as alleged in a special count. Now *Story* in his work on Agency, edition of 1869, by *Redfield*, sec. 420, lays down the doctrine applicable to this class of cases thus: "If the agent is the only known or supposed principal, the persons dealing with him will be entitled to the same right of set off as if the agent were the true and only principal." Adding, "but subject to these rights and those of the agent himself, the principal may generally sue upon such a contract in the same manner as if he had personally made it." In the next section he says: "This doctrine is of high antiquity in the common law, and it is so consonant to natural and reciprocal justice that it probably had its foundation in the earliest rudiments thereof." The cases cited in support (and they are legion) are all, or nearly all, *English*, comprehending all those cited on the argument by defendants' counsel, and many more.

Assuming this to be the law (and who can doubt it?) after such a finding by a jury properly directed, there is no room for doubt, no fulcrum on which to rest a lever to disturb the verdict. The plaintiff's rule must be discharged with costs.

STIMPSON v. THE NEW ENGLAND AND NOVA
SCOTIA STEAMSHIP COMPANY.

PLAINTIFF, a passenger from Halifax to Portland by one of defendant Co.'s steamers, sued for the value of her trunk which she alleged had been placed in the hands of the Co.'s servants and a check given her therefor. Defendants denied receipt of the trunk, and gave evidence that plaintiff had received the check not from them, but from the cabman who had driven her to the wharf. At the trial the learned Judge was inclined to grant a motion for a non-suit, but consented to hear defendant's evidence, and take a verdict subject to the opinion of the Court, whereupon a verdict was rendered by consent for plaintiff for the full amount claimed. The question was purely one of fact, the only point of law involved being as to whether the plaintiff ought not to have been non-sued.

Held, that there should be a new trial, as the case was one for a jury only, and not for the Court to decide.

MCCULLY, J., now, (February 4th, 1873, delivered the judgment of the Court as follows:—

This was an action tried before his lordship Mr. Justice *Ritchie*, May sittings, 1872. It was an action brought by plaintiff to recover from defendants the value of a trunk and contents valued at \$400 alleged by plaintiff to have been put on board defendants' steamboat at *Portland, Maine, U. S.*, to be conveyed as part of her travelling luggage, she being a passenger at the same time on board, on a trip from *Portland* to *Halifax*. There was not much if any conflict or discrepancy in the testimony between the witnesses examined on the part of plaintiff and defendants respectively. At the close of plaintiff's case defendants' counsel at the trial moved for a nonsuit. The learned Judge reports that he "thought the evidence insufficient to render defendants liable for the loss of the trunk, but consents to hear the evidence of defendants, and take a verdict subject to the opinion of the Court. The defendants' evidence consisted of depositions and examinations *de bene esse*, reduced to writing, whereupon a verdict for plaintiff was rendered by consent for \$400, subject to the opinion of the Court, to be entered for defendant if the Court should be of opinion that the plaintiff is not entitled under the evidence to recover."

McDonald, Q. C., for plaintiff, and *Blanchard*, Q. C., and *N. Ritchie*, for defendants.

In *Brookbank v. Anderson*, 7 Sc. N. R., 813, (see *Fisher*, 6947,) it is laid down that the Court will not in general take

upon themselves the office of a jury in deciding a special case submitted to them by agreement of the parties, when the principal questions are questions of fact, to be decided upon the conflicting testimony of witnesses whose credit is made a matter of question. And in *Whitmore v. Claridge*, 8 Jur. N. S., 1059, 10 W. R., 1057, Q. B., (Fish. D., 6947,) where a *nisi prius* power is reserved to the Court to draw inferences of fact, they may nevertheless decline to pronounce upon a question of fraud. *Engstrow v. Brightman*, 5 C. B., 419. The Court refused to allow a special case stated under 3 *Wm. IV.*, chap. 42, sec. 25, to be argued, where the Court was to draw inferences from the facts stated as a jury might, and liberty was reserved to either party to turn it into a special verdict. See also upon the same point on a special case stated under the above statute, *Aldridge v. Great Western Railway Co.*, 4 Sc., N. R., 156, 1 D. N. S., 247, 3 M. & G., 515. Held in this case, that there was evidence for the decision of a jury with regard to the negligence of the Company, and that upon the facts stated the Company was not entitled to a nonsuit, and that the case, therefore, was improperly stated for the opinion of the Court under the statute.

Our Provincial statute, chap. 134, *Practice Act*, secs. 51, 52 and 53, provides for trials of causes after writs issued by leave of a Judge in this Court without pleadings, and also that questions of law, after writs issued, may be stated for the opinion of the Court without pleading. This seems to be a consolidation of the statute of *Wm. IV.*, though not exactly a transcript. By sec. 251, chap. 134, *Practice Act*, a case entered into by real parties, plaintiff and defendants, and signed by counsel, may be filed, entered and argued without a writ, and judgment and execution follow. The 15 & 16 *Vic.*, chap. 76, seems to have been the basis of our enactment on this point, but they materially differ in several respects.

The course adopted by the learned Judge at the trial by the consent of parties, may not be without precedent both here and in *England*, and warranted by the practice of the Courts, but there has been a pretty strong disposition manifested by the Supreme Court of this Province at various times, to prefer that juries empannelled and sworn should be required to discharge the functions imposed upon them of passing upon

all questions of disputed fact and drawing proper inferences therefrom.

In the present case, the only question of law involved that I have been able to discover is, whether the plaintiff ought or ought not to have been nonsuited,—whether there was or was not any evidence for the consideration of a jury. According to her own testimony she had come from *Bangor* to *Portland*, and took a cab to the defendants' steamer, the *Carlotta*, having one large trunk, two other persons being in the cab with her whom she did not know, her trunk being marked with her name and address to *Halifax, N. S.* The cab, she says, drove close to the steamer. She did not see whether they (the other passengers) had trunks in the cab. There was other baggage about the steamer. She says, "I asked the cabman if he would take my trunk on board. He said 'no, they would take it on board themselves,'" (meaning the people of the ship). Her name was in three places on the trunk on cards. Then she says, "I saw the cabman place my trunk with the other baggage on the wharf. It was then I asked him to take it on board; the people on board the boat were then taking baggage on board. It was raining. I went immediately on board after seeing my baggage with the other baggage. I went down to the cabin and found the stewardess. . . . I asked if she would pay my passage and get my check. She brought my passage ticket and a check for my trunk. I gave no directions about my trunk. Did not see the trunk after I saw it on the wharf." In her cross-examination she says, "The wharf and dock at *Portland* were large, open, and uncovered. I found a similar trunk with a check corresponding with my check. It was not mine; I would not receive it." (This was at *Halifax* of course.) "I noticed a man who took charge of the baggage, and I saw him putting on checks on the wharf. He was the baggage-master. The other passengers in the cab did not come in the *Carlotta* (the steamer). They went in some other direction. I entirely trusted to the stewardess to see my trunk checked."

This was really the plaintiff's case. And although the witnesses for defendants not any of them perhaps contradict the plaintiff, they supply much of what she seems to have omitted, giving quite another gloss to the transaction. For

instance; the stewardess swears that when plaintiff came into the cabin, after asking her if she was stewardess, and some conversation about a previous trip she made, *Martha Stevens* says: "I remember plaintiff coming into the cabin, &c.; she said, the coachman will hand you the check for my trunk. The coachman handed the check to me, and I gave the check to plaintiff. I was not on the wharf, did not see the trunk." Again, "I asked her in the cabin whether she knew the coachman, and she replied 'it was all right.'" She proceeds: "All I know about the matter is, that I took the check from the coachman and handed it to the lady. He told me it was the check of the plaintiff's trunk, and I handed it to her." In her cross-examination it appears that the coachman was in the cabin, but says: "Plaintiff came down before the coachman. She was in her state-room when the coachman came down, &c. I was not in the habit of taking checks from coachmen; the usual course was for the baggage-master to hand me the checks, which I delivered to the ladies. The coachman could not get this check from any one but the baggage-master." And if this witness is to be believed, she had previously sworn, "the plaintiff told her to get the check from the coachman." *Farrell*, the baggage-master's testimony is to the effect that he heard plaintiff tell the coachman to get her trunk checked, and that he checked the trunk brought by him as hers, and when so checked handed the counterpart of the check to the coachman as she directed, to be taken to her on board.

After a careful examination and consideration of the case and the evidence, I am by no means sure that the learned Judge was not quite right in directing a nonsuit. Still there are inferences that a jury might possibly draw favorable to plaintiff's interests, if they could arrive at the conclusion that the trunk she saw taken off the hack or coach was hers, and that she saw it actually deposited among the other baggage. and yet how that could be, in the teeth of the testimony of defendants' witnesses, I am utterly at a loss to conjecture.

I do not think it desirable that the Court should have the functions of a jury super-added to their own, unless in some very special and exceptional class of cases. Even in what is

called the summary jurisdiction of the Court over small sums and petty trespasses, not infrequently the presiding Judge sends them to a jury, and in this case, after bestowing the best consideration upon it in my power, I think it better to remit it back, that a jury may pass upon the facts as they may be presented upon a new trial. If plaintiff can satisfy an impartial jury that her trunk ever came into the possession of the defendants, their porter or baggage-master,—the same officer here,—they are clearly liable, and the *onus probandi* as in other cases is upon her. The costs of the argument to abide the result of the suit.

INGLEFIELD v. MERKEL ET AL.

PLAINTIFF and the two defendants, M. and H., were attending service in a church of which plaintiff and M. were pew-holders and H. the churchwarden. M., conceiving that plaintiff had given him cause of offence and was interfering with his family, came to the door of plaintiff's pew and, raising his clenched hand as though to strike plaintiff, ordered him out of the church, at the same time applying to him opprobrious epithets. Plaintiff refused to go out until the service was over, whereupon defendant H. approached and also ordered plaintiff to go out, saying that if he did not he would have him expelled. Plaintiff thereupon wishing, as he alleged, to avoid a disturbance in the church, went out. Neither of the defendants had any personal contact with the plaintiff or made any other show of force than as already described.

Plaintiff sued for damages for an assault, and for wrongful interference with his rights as a pew-holder in the church.

The jury found a verdict against M. only and acquitted H., and M. moved to set the verdict aside.

Held, WILKINS, J., dissentiente, that M. had been guilty both of a "disturbance in the church" and of an assault, and that the verdict should stand.

MCCULLY, J., now, (February 4th, 1873,) delivered the judgment of the Court as follows:—

This case was tried before his lordship Mr. Justice Wilkins at the *April* sittings in 1872, when a verdict passed in favour of the plaintiff for \$25 against *Merkel*, and acquitted *Harrington*, the co-defendant. The first count of plaintiff's writ charged defendants with an assault and battery and false imprisonment. The second count was for an assault and battery and expelling him from *St. George's Church* in the City of *Halifax*. The third count alleged possession in plaintiff of a pew in the parish church of *St. George, &c.*, and defendants disturbed him in the enjoyment of his rights by wrongfully

entering during divine service and expelling him, &c., and hindered and prevented him from using his pew in as ample a manner as he had a right to do, and for these offences plaintiff claimed damages. The defendants severed in their pleadings; *Merkel* pleaded a single plea of denial of the charges. *Harrington* pleaded several pleas: 1st, Not guilty of the whole declaration; 2nd, Denial of the assault and imprisonment charged; 3rd, Denial as in the third; 4th plea is to the third count, and a denial of the disturbance, &c.; 5th plea is that he was a churchwarden, &c., and defendant behaved in a disorderly, indecent and unbecoming manner during divine service; and then justified by saying that he requested plaintiff to leave the church, which he did, *quae sunt eadem*, &c.

The foregoing are the issues and the finding upon which a rule *nisi* was granted by the learned Judge who tried the cause, calling upon the plaintiff to show cause why the verdict should not be set aside as against law and evidence. *Mr. Blanchard*, Q. C., was now heard in support of the rule; *Mr. Coombes* and *Mr. Henry*, Q. C., showed cause.

The plaintiff's case was sustained by his own testimony, that of *N. W. DeWolf* and *E. Cutlip*; defendants called no witnesses. The evidence shortly set forth was that on a certain Sunday during divine service, defendant *Merkel* rose up from his seat (which was nearly in a line drawn from plaintiff's pew and the pulpit) on the opposite side of an aisle and some nine feet distant, and crossed the aisle and came towards plaintiff and raised his clenched hand, as if to strike plaintiff, being then but two feet distant. So the plaintiff testified. That he then said, addressing plaintiff, "you old rascal you are interfering with my family," &c. "I (plaintiff) said I didn't interfere with you or your family. He said you shall go out of that. I replied I will go out when the service shall be over. He said you shall go out. Defendant *Harrington* and his son came out to defendant and said you must go out. They were then about three feet from me. *Harrington* said, if you don't go out I'll get the churchwarden to interfere and put you out. I then went out quietly, because I did not want to make a disturbance in the church. I thought they might have seized me and I should

have had to knock them down. The cross-examination and the testimony of the other witnesses did not materially vary the statement of plaintiff. They seem confirmatory of it, with such slight variations as usually occur where witnesses speak and describe a scene from different standpoints. *De Wolf* says: "*Merkel* shook his hand in plaintiff's face near enough to strike him, and said you old liar you must go out now. Plaintiff was compelled to go out by the two defendants." In his cross-examination he says: "When *Merkel* shook his fist one fist was uplifted," &c. *Cutlip* says: "I saw him (*Merkel*) leave his pew, come across the aisle, &c. I saw him shake his fist at plaintiff and heard him say, 'you old rascal,'" &c. This, he remarks in his cross-examination, "was after the service had proceeded five or ten minutes." This witness proved that *Harrington* was a churchwarden, and adds: "I did not see any violence on the part of *Harrington*. The general service was not interrupted," he says, adding, "the congregation was not disturbed. He had stated a little before that *Harrington* the churchwarden came out of the pew which he left on seeing what I have described between *Merkel* and plaintiff." This description did not materially vary from plaintiff's.

Under such circumstances there can, I apprehend, be no room for doubt but that an assault was sufficiently proven to justify a verdict in favour of plaintiff as against the defendant *Merkel*; and although I have not thought it necessary to transcribe the whole of the testimony by which it was sought to implicate *Harrington*, it is equally clear to me that there was little, if any evidence, to warrant a verdict against him for a joint assault.

At the close of the plaintiff's case, defendants' counsel called upon plaintiff to elect against which of the defendants he would proceed (on the ground of there being no evidence of a joint trespass), which plaintiff's counsel declined to do, although the learned Judge who tried the cause at the time thought he should have done so, as he reports his opinion, by his minutes.

This objection was raised and renewed by *Merkel's* counsel on the argument. He contended that if *Harrington* had been acquitted, as he should have been had *Merkel* chosen to

have called him as a witness, all objection, even as regarded his credibility would have been removed. He cited *Addison on Torts*, 940; *Roscoe's Dig.*, 799; 2 *M. & Rob.*, 509, and 4 *Exch.*, 444.

The case of 2 *M. & R.*, 509, *Howard v. Newton*, relied upon and cited both in *Roscoe* and in *Addison*, is to this effect, and quoted by *Roscoe* thus: "Where the plaintiff proves *distinct*, and unconnected *trespasses* by different defendants he will be made to elect on which he will proceed before defendant opens his case." But this does not apply, because the whole transaction was one and single, and in the language of the witness *DeWolf*, "in about five minutes all happened." The trespass, if any, was continuous and indivisible, defendant *Harrington* coming upon the other after the noise began. Commenting upon this same case *Addison* says, above: "When the plaintiff's evidence discloses no joint trespass committed by all the defendants, but only separate trespasses by each, the plaintiff may be put to his election against which of the several defendants he will proceed." Now in this case, plaintiff's charge in the third count is against both defendants for an assault and disturbance of his pew rights. There is no evidence of an actual assault by *Harrington*, and although he said to plaintiff, "you must go out, if you don't I'll find some authority to put you out," the witness adding, "plaintiff was compelled to go out by the two defendants," (see line 135 of the minutes, *DeWolf's* evidence,) the jury, nevertheless, have acquitted *Harrington* of all complicity as regards both branches of the case, viz., the assault and the disturbance, yet I am by no means prepared to say that there was no evidence whatever for the consideration of the jury,—the whole as already remarked being but one transaction,—and if there was any, the slightest, to implicate *Harrington* in the charge of the assault and disturbance, it was clearly the province of the jury to pass upon it;—he sided with *Merkel*, so far as to order him out of the pew and out of church.

As to what constitutes a *disturbance*, see *Finch*, 187; 3 *Black. Com.*, 235; *Com. Dig. Ac. on the Case*, plea 3—1, 6. The legal definition is, "a wrong done to an incorporeal hereditament by hindering or disquieting the owner in the

enjoyment of it." And the remedy is by action on the case, or in some instances in equity by injunction. *Bouvier's Law Dic.*, "Disturbance." Can it be contended that there was no evidence whatever to implicate both defendants in the offence of "a disturbance" of the plaintiff in his rightful occupation of a pew in the parish church of *St. George*? It is no matter by what tenure he held this pew. Seats and pews in churches (in *England*) says *Roscoe*, p. 709, built after 1818, are let and assigned under various statutes, so that the ancient doctrine of "prescription or faculty," and the right being "an easement to a messuage or dwelling-house annexed," &c., has no application here. In this case plaintiff's right to occupy the pew in question is not in controversy, and according to his own testimony and that of his witnesses, nothing (it seems to me) appears authorizing a churchwarden or any one else, even temporarily to disturb him or to deprive him of the use of it for any, the shortest period of time. Assuming the testimony of the witnesses to be true, and that there was no provocation other than what is reported in the minutes of the learned Judge, and I must so assume, it seems to me that the churchwarden had occasion for ordering *Merkel* out of church, and had the jury upon the evidence found both defendants guilty on the third count only, I do not very well see how such a verdict could have been disturbed.

On the part of plaintiff, it was contended that one defendant in a case like the present could not move to set aside a verdict such as this, and several authorities were cited for this position. *Tidd's Pr.*, 910; 13 *Mee. & W.*, 811; 13 *C. B.*, 848; 4 *C. B., N. S.*, 267, and 4 *Bing.*, *N. S.*, 215. In the view I take of this case, it is not necessary to arrive at any decision upon that point.—but if it were, there is, I apprehend, little room for doubt that it was perfectly competent for *Merkel* to sue out such a rule, and to urge this application without reference to his co-defendant. See *Price v. Harris*, 10 *Bing.*, 332.

In closing his argument, *Mr. Blanchard* drew attention to the verdict as rendered, which was as well for the disturbance as for the assault. And he contended, and attempted to make it appear, that there was no evidence for such a finding against *Merkel*. But so far as the "disturbance" extended,

if there were any, it was the act of *Harrington* the churchwarden and not that of *Merkel*. But surely if *Merkel* with a clenched fist, within striking distance, and in a threatening attitude, ordered plaintiff out of his pew during divine service, and in such a way, in an audible voice, as that the congregation or a portion of it heard him, and the churchwarden came forward, as he contended, to allay the strife,—ordering plaintiff out of his pew and, out of the church,—this was a “disturbance” in the language and eye of the law, as well as an assault on *Merkel’s* part, though he did not lay his hands upon the plaintiff, nor forcibly expel him from the church, plaintiff retiring of his own accord for the reasons he assigns.

I think the verdict should stand, and that *Merkel’s* rule *nisi* must be discharged.

WILKINS, J., *dissentiente*—After a careful consideration of the authorities my mind has reached a conclusion that in this case *Merkel* did not commit an assault. In order to consider the question I shall state the facts, promising that they exclude the idea of concerted action towards the plaintiff of the two defendants, the movements and conduct of them relatively to each other and to the plaintiff having been distinct, independent and consecutive. *Harrington* was a warden charged with keeping order in the church; *Merkel* was an attending member of the congregation. *Merkel* left his pew from real or fancied offence on the part of the plaintiff; *Harrington* left his pew to prevent threatened disorder. *Cutlip*, a witness who details the occurrences in their order, proved that after *Merkel* shook his fist against the plaintiff, when near enough to strike him, using offensive words but not threatening violence, he, without having touched the person of the plaintiff, withdrew himself from the plaintiff’s pew, and, without the slightest act of violence, returned to his own pew. *Cutlip* further shows that the plaintiff did not leave his pew until after both the defendants had resumed their seats. His words are: “Plaintiff didn’t move on hearing from *Harrington*” (who came to the plaintiff’s pew after *Merkel* had reached it) “you had better go out.” Again, “when *Harrington* got to plaintiff’s pew *Merkel* was on his return to his seat.”

Again, "*Harrington* had returned to the warden's pew before the plaintiff went out." Thus a supposition of plaintiff having quitted his pew to avert or avoid battery threatened by *Merkel* is excluded from the case. In view, then, of any definition of an assault which I have found in text writer or case, an assault cannot be predicated of *Merkel's* acts as connected with his words. As to the influence that moved plaintiff to quit his pew that is settled by himself. After stating that *Harrington* had said to him "if you don't go out I'll get the churchwarden" (meaning no doubt a colleague) "to interfere and put you out. I then" (that is when told that he would be put out by the church authorities) "went out quietly. I went out because I didn't want to make a disturbance in the church. I thought they might have seized me, and I should have had to knock them down." Now in saying this he could not have possibly referred to *Merkel*, for he then was in his own pew. When plaintiff quitted his pew both the defendants had returned to their pews. It is made certain, therefore, by the plaintiff, that he did not quit his pew from fear of violence by *Merkel*, or to avoid a personal collision with him. The question, then, resolves itself into this: Where A by gesture appears to threaten violence to the person of B with an uplifted hand, unarmed with a weapon, using insulting language to B, but language not menacing force,—afterwards without violence committed, or an unequivocal manifestation of an intent to commit violence, withdraws to such a distance from B as renders the commission of violence to him impossible, and then, after this B retires from his position, has A committed an assault on B? This must be answered, as I think, in the negative. *Hawkins* defines an assault as an attempt or offer with force and violence to do a corporal hurt to another, with or without a weapon, though the party striking misses his aim,—so drawing a sword, or any similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person of another, will amount to an assault." 1 *Hawk. P. C.*, 621, In *Pennsylvania*, in the case of *Commonwealth v. Eyrie*. 1 Serg. & Rawl. Reps., 347, it was held that if a man raise his hand against another, within striking distance, and at the

same time say, "if it were not for your gray hairs, &c.," it is no assault." This shows that the mere act of raising a hand against another within striking distance is not necessarily, *per se*, an assault. The intention as manifested by the surrounding circumstances must be inquired into. In *Waterlow's Arch. Cr. Pr. Pl.*, 282, in a note, it is said: "The received definition of an assault in *England*, is that according to *Hawkins*, there must be design to do bodily hurt, and the intention must co-operate with the act in constituting an assault."

In the following case we have this question illustrated. A learned *American Judge*, in *The State v. Davis*, 1 Iredell's Reps., 125, said, in accordance with *Englisk* principles, "the assault must be intentional, for, if it can be collected, notwithstanding appearances to the contrary, that there is not a present purpose to do an injury, there is no assault." The learned Judge continued: "It must also amount to an attempt, for a purpose to commit violence, however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault." These, I apprehend, are pregnant words, and to our purpose. There is a touchstone by which to try this question. With the exception of the mere fact of *Merkel*, under excitement, when near enough to strike plaintiff, shaking his fist against the plaintiff's person, or appearing to do so, perhaps from mere excitement, where is there evidence of an intention, and then present purpose to strike the plaintiff? There is, in view of all the circumstances, absolutely none! *Merkel's* words furnish no such evidence. They were, "you old rascal you are interfering with my family; you shall go out of that. According to plaintiff's son-in-law who sat by his side, "you old liar, you must go out now." That same witness added, all I heard from *Merkel* was, "you old rascal go out of church; and again, "after this *Merkel* called plaintiff a liar." The unmistakeable object of *Merkel's* act and words was to get the plaintiff out of church. To effect that purpose by means of violence is a purpose not necessarily indicated or intimated by *Merkel's* language or conduct. The plaintiff was comparatively young, and in his own estimate of his physical powers strong enough to have knocked down his opponents,

an act as he tells us contemplated by him,—*Merkel*, on the contrary, is represented to us as a feeble man. *Merkel* manifestly had no present intention to strike the plaintiff—he made no effort to strike him—no battery of plaintiff was begun by him. These are all essentials in the legal notion of an assault. The entire absence of them all is manifest from the simple consideration (the inferences from which are irresistible) that at the time of the occurrence nothing was interposed or existed to prevent his carrying into act such an intention if he had entertained it. He went back to his pew without consummating it. This argument would have no force, of course, if the defendant pointed a loaded gun at plaintiff and retired without discharging it; and for this obvious reason, that the very act in that case would have carried with it the evidence of a then present intention to assault. The intention would necessarily have been inferred from the act. Here, if the act (accompanied with the words) did not indicate the existence of an intention to do violence, it was at least equivocal.

The books present a class which would have been applicable and important if plaintiff had left his pew to avoid or avert violence from *Merkel*. In *Arch. Cr. L. & P.*, 282, in notes, I find this passage: "Where an unequivocal purpose of violence is manifested by any act which if not stopped or diverted will be followed by a personal injury, the execution of the purpose is thus begun,—the battery is attempted. Thus riding after a person so as to compel him to run into a garden for shelter to avoid being beaten, has been adjudged to be an assault. So in a late case before a very eminent *English* Judge it was held that where the defendant was advancing in a threatening attitude with intent to strike the plaintiff, so that his blow would in a second or two have reached the plaintiff if it had not been stopped, although when stopped he was not near enough to strike, an assault was committed. *Stephens v. Myers*, 4 C. & P., 349.

In *Greenleaf's Ev.*, vol. 2, sec. 82, an assault is well defined to be an inchoate violence to the person of another with the present means of carrying the same into effect." The learned author adds: "Where threats alone do not constitute the offence, there must be proof of violence actually offered." He

adds at sec. 83: "The intention to do harm is of the essence of the offence of an assault, and this intent is to be collected by the jury from the circumstances of the case." Again at sec. 94: "In the case of a mere assault the *quo animo* is material, as without an unlawful intention there is no assault."

In *Alderson v. Wastell*, 1 C. & R., 359, *Rolfe*, B., said: "With reference to the younger defendant, *H. W.*, the only evidence is that he threw a stick, which stick struck the plaintiff. But this is not sufficient of itself to constitute an assault, inasmuch as it does not appear for what purpose the stick was so thrown, and it is therefore fair to conclude that it was in fact thrown for a proper purpose.

In *Selwyn's N. P.*, 126, it is said: "Whether the act shall amount to an assault must in every case be gathered from the intention." He cites *Griffin v. Parsons*, which is thus noticed, and in *Hall v. Nearnley*, 3 Q. B., 320, shows that a seizure of the person is not necessarily an assault, but that the *animus* with which the act is done is material.

An effort at violence by means of a loaded firearm is in one sense peculiar. Pointing a loaded gun at another is *per se* an unequivocal attempt to commit violence,—an assault,—the intention would be inferrible from the act, as to whether pointing at another a firearm proved to be unloaded and incapable of being discharged is an assault in law seems even now doubtful. A. D. 1840, in *Regina v. St. George*, Mr. B. *Parker* ruled in these words: "It seems to me that it is an assault to point a weapon at a person, though not loaded, but so near that if loaded it might do injury. I think the offence of pointing a loaded gun at another does involve an assault unless it is done secretly, and I think that the presenting a firearm which has the appearance of being loaded, so near that it might produce injury if it was loaded and went off is an assault." A. D. 1844, in *Regina v. James*, it was ruled by *Tindall*, C. J., that it was not an assault to point a loaded pistol at any one if proved not to be so loaded as to be able to be discharged.

In *Hays v. The People*, 1 Hall's Reps., 351, the prisoner had decoyed a female under ten years of age into a building for the purpose of ravishing her, and was there detected while

standing within a few feet of her in a state of indecent exposure. Held that while there was no evidence of his having actually touched her, he was properly convicted of an assault. Here detection alone obviously prevented the prisoner from consummating an intended purpose of assault. In *Morton v. Shoppee*, 3 C. & P., 373, in assault, plea general issue. The plaintiff was walking along a foot-path by the road-side at *Hillington*, and the defendant who was on horse-back, rode after him at a quick pace. The plaintiff ran away and got into his garden, when the defendant rode up to the garden gate (the plaintiff then being in the garden about three yards from him), and shaking his whip said, "Come out and I'll lick you before your own servants." *Denman* objected that this did not amount to an assault. Lord *Tenterden*, C. J., said the defendant rode after the plaintiff so as to compel him to run into his garden for shelter to avoid being beaten, that is in law an assault. In all the cases of this class there was what is wanting here,—a then present purpose,—an effort made to commit an assault,—a battery begun.

On the point of the assault which I have been considering, the question, from the nature of it, is speculative. Minds of equal intelligence may differ about it. But on the point of disturbance of the pew, which I shall presently consider, I am unable to conceive how there can be a difference of opinion. To my mind it is as demonstrable and certain as a solved problem in *Euclid*, that disturbance of the pew is a matter that must be eliminated from the case. I shall show this by and by. If, indeed, this defendant committed any offence at all *in facie ecclesiæ*, the offence was precisely that which, among those who are so blessed as to live in subjection to the canons of the Church, would be brawling. But the people of this Province are in that infelicitous condition in regard to ecclesiastical authority in which *Mr. Brougham*, in one of his great speeches at the bar described the inhabitants of *Scotland* to be when he exclaimed: "Poor benighted heathen! from *Dan* to *Beersheba*,—from *Mariden-Keith* to *John o'Groat's*,—they haven't got a bishop, or even a rural dean!" We have got them, indeed, without the power of fulminating the dread artillery of the canon law. We have no reason to tremble

under the terrible words of the canon 88 (see 1 *Burn.*, 390): "If any person shall by words only quarrel, chide or brawl in any church or churchyard, it shall be lawful unto the ordinary of the place where the same shall be done, and proved by two lawful witnesses, to suspend every person so offending, if he be a layman from the entrance of the church, and if he be a clerk from the ministrations of his office, for so long a time as the said ordinary shall think meet according to the fault." It was well for poor *Mr. Merkel* that he was not subject to section 2 of the same section, for, had he struck, he would have been by virtue thereof excommunicated and excluded from the fellowship and company of the congregation." *Harrington's* position would have been more favorable, for I gather from *Burn* that in relation to the words of the canon "lay any violent hands," it has been holden that "churchwardens who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb divine service, and turn them out of the church, are not within the meaning of the canon." I hope *Mr. H.* will be duly grateful to me for thus showing him his powers and responsibilities in the church. It is not probable, I think, that *Mr. Merkel*, in view of the sanctity of the place really contemplated violence with a strong hand. Terrible deeds we know from history have been done in olden time in such places. *Thomas a Beckett* was assassinated at the very shrine of *Saint Benedict*. *Bruce's* dagger drew the life blood of *Comyn* at the high altar of the *Black Minories*. But such dark deeds are not likely to be done in these enlightened days; nevertheless a very tragical affair occurred of later years in *Merry England*, women as usual being at the bottom of it. The wives of Lord *Strange* and Sir *John Tressel* contending for precedence in the church of *St. Dunstan*, their husbands with their retinue drew their swords within the body of the church,—some were killed and some wounded. For this offence by process in the court christian the Lord *Strange* and his lady did penance imposed by that exemplary prelate, Archbishop *Chichley*. The Lord *Strange* walked bareheaded, with a wax taper lighted in his hand, and his lady barefooted, from the church of *St. Paul* to that of *St. Dunstan*; where being re-hallowed, the lady with

her own hands filled all the church vessels with water, and offered to the altar an amount of the value of £10, and her lord a piece of silver of £5. The Court was wisely discriminating as to the comparative guilt, and the measure of the punishment. I am not sure in view of this that Archbishop *Manning* is not right in desiring the return of those happy days, when women could be thus punished by the Church for the mischief they cause to their husbands, and with so little punishment to their lords whom they have tempted to evil.

After this I hope pardonable digression into which I have been betrayed by researches *in voce* "brawling," *revenons a nos moutons*, I return to my subject, and to a second branch of it, which is extremely important, I mean that which relates to the alleged pew disturbance. If I read our rules of pleading aright, and I humbly think I do, a plaintiff in our Court can only recover *secundum allegata et probata*. Tried by this test, it is simply out of the question that a verdict founded in part on this count for disturbance can be sustained. It is in these words: "For the plaintiff as against *J. W. Merkel* for assaulting the plaintiff and disturbing him in the peaceable possession of his pew, \$25." In the 3rd count,—the only one necessary to be considered,—the defendant *Merkel* is charged with disturbing the plaintiff in the peaceable possession of his pew, but in no sense that is in any one particular borne out by the facts. He is therein charged precisely as in *England*, according to the established formula, a party has often been charged with acts in relation to a pew in a church, done in material disturbance of the occupant of the pew, and in material invasion of or interference with his alleged right to the possession of the pew,—for acts which are in fact or theory a forcible entry into the pew, or an expulsion of him who occupied, or in keeping him out of the pew. Of such a charge and such a charge only has the defendant *Merkel* had notice by the declaration. The count charges, not brawling or moral disturbance, which is without the cognizance of courts temporal,—of such every occupant of pews adjacent would have an equal right to complain with the plaintiff,—but with disturbance by "a wrongful entry into the pew during divine service," by "expelling the plaintiff from the pew," by "hindering and preventing him from entering the

pew," and by "hindering and preventing him from using the pew in as ample a manner as he had a right to do." All this imports physical agency and physical agency only. The last part of the count is plainly in legal import a mere statement of the consequences of the preceding important acts. The defendant is plainly charged just as he would have been in trespass, for illegally entering and holding the plaintiff's dwelling-house. The evidence shows that defendant neither entered the pew nor expelled plaintiff from it, nor hindered and prevented him from entering, nor hindered nor prevented him by any physical tangible act of defendant, from using the pew in as ample a manner as he had a right to do. Defendant *Merkel* did not by any act of his, of which he is charged, or of which the law of the land could take cognizance, hinder the plaintiff from the most ample use and enjoyment of his pew. The only influence proceeding from him in any sense consisted of the words "you must go out," uttered when the utterer stood outside the plaintiff's pew. It has already been noticed that the evidence shows that the plaintiff voluntarily, and without any force or influence then operated by defendant *Merkel*, and when *Merkel* had resumed his seat in his own pew, quitted the seat that he had occupied. We know that in an *English* court the plaintiff would have been out of court on his own statement. In *Stocks v. Booth*, 1 T. R., 428, possession for above sixty years was not held sufficient to maintain an action on the case for disturbance in the enjoyment of a pew; but feoffment raises a presumptive right and a faculty, and plaintiff should claim it in his declaration as appurtenant to a marriage in the parish." *Ashhurst, J.*—"Bare possession can never give a right, because it is the plaintiff's own fault if he do not give to himself a complete title to a pew, which he can do by applying to the ordinary for a faculty, or to the minister or churchwardens to let him a seat in the church. If bare possession were allowed to be a sufficient title it would be an encouragement to commit disorder in the church, for disputes would frequently arise respecting the possession." *Buller, J.*—"Trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession, the possession of the church being in the parson." *Abbott, C. J.*, said, in *Mainwaring v. Giles*,

5 B. & A., 361, which was a case for disturbing plaintiff in the possession of his pew: "No action at the common law can be maintained for a disturbance, because the pew is not alleged to be attached to a dwelling-house. The disturbance is matter for ecclesiastical censure only." Now I am not going to enter on an inquiry as to whether in this case, which is between members of the Church of *England* in *Nova Scotia*, and where the theatre of alleged disturbance was an Episcopal *English* church, and where the case is one in relation to which both the contending parties might be held by virtue of an implied contract to be bound by ecclesiastical rules not inapplicable to the condition of a church in a colony. Circumstances might exist that would render such an inquiry necessary, but they don't exist here. It suffices to say, that it is undeniably a fact that the evidence reported, viewed in connection with the declaration, shows that the defendant was not guilty of any one act imputed to him under the allegations importing a disturbance of his possession of the pew. Inasmuch, then, as a verdict stands against him, finding him indiscriminately guilty of assault and disturbance, with damages for both, that verdict, in my opinion, must be set aside.

HARE v. MURPHY.

In a case of replevin the defendant withdrew his pleas and gave a confession, upon which plaintiff regularly entered up judgment. Some time subsequently W., who was not a party to the suit, but who claimed the goods replevied under an assignment from the defendant, and was one of the sureties upon the replevin bond to the sheriff, sought to have the judgment set aside, on the ground that the confession was a fraud upon him and the other creditors of defendant, and also that he had joined with defendant in the pleas which had been withdrawn without his sanction. This latter allegation was denied both by defendant and defendant's attorney, whom W. swore he had instructed to act for him.

Held, that W. not being a party to the record, had no *locus standi*, his redress, if any, being against defendant's attorney, and also that he had been guilty of *laches*.

WILKINS, J., now, (February 4th, 1873,) delivered judgment as follows:—

In replevin the plaintiff obtained and entered up judgment in this cause against the defendant upon a confession given by the latter. *Mr. Wallace* asks the Court to set aside that

judgment and the confession on which it is founded, and that he may be allowed to defend the action, on certain pleas on file in the cause, (which pleas were after the filing of them withdrawn by the defendant's attorney,) so far as the matters therein stated concern *Mr. Wallace*, on the ground, 1st, that confession was a fraud on *Mr. Wallace*, and on him and the other sureties on the replevin bond, and also on the grounds stated in his affidavit. To that end he obtained the rule *nisi* before us, which was granted by the Court, on the 3rd of *January*, 1871.

We will first consider *Mr. Wallace's* affidavit, and the affidavits read in reply thereto. He claims the goods in question under an assignment from the defendant and one *James Shaw*, then partners, duly registered by him (*Wallace*) when no other bill of sale was registered or on file affecting the property. He states that the plaintiff claimed the property on a bill of sale not registered or filed, on which plaintiff's action is founded. He alleges that the defendant was not then interested in the goods, the claims of his creditors greatly exceeding the value of the property; that, as one of the sureties to the sheriff he (*Wallace*) signed the replevin bond. He then proceeds to state, in substance; that he delivered the writ, issued in the cause, to *Mr. LeNoir*, prepared the pleas, and instructed *Mr. LeNoir* to defend the suit for him; that *Mr. LeNoir*, after having appeared and pleaded, without the sanction of *Wallace*, withdrew his defence, and left it open to the defendant to give the confession on which the judgment was entered.

With regard to all these allegations touching *Mr. LeNoir* it will suffice to say that one and all of them are denied by him and defendant. Defendant swears he handed the writ to *LeNoir*, and without any conference with *Wallace* instructed *LeNoir* to defend the suit; that the last-named gentleman withdrew his defence with the consent and approval of defendant, and that the confession that was given was the voluntary and deliberate act of the defendant. These allegations of the defendant are distinctly and positively confirmed by *LeNoir*, who says further, that he was not retained by *Wallace* to act in any manner for him in the cause, that he drafted the pleas without reference to *Wallace*; that when

he spoke to *Wallace* and asked him if he would pay costs of defence incurred and assume responsibility for future costs, he positively refused to do so. He affirms that he never had any conversation with the plaintiff on the subject of the suit, and that, finding defendant unable to indemnify him against costs, he withdrew the defence and notified *Wallace* for the reasons stated in the notification. He concludes his affidavit by stating that the object of the defence first made by him was, if possible, to get the plaintiff to come into the assignment, and by a compromise or otherwise to enable the defendant to continue his business, and that the assignment to *Wallace* was drawn with that object. In view, then, of the denial by defendant and *LeNoir* of all *Mr. Wallace's* statements above noticed, the first ground stated in the rule fails and must be dismissed from our consideration. If, notwithstanding the contradiction thus involved in the affidavit, *Mr. Wallace* chooses to deal with *Mr. LeNoir* as his attorney, retained by him, to protect and defend his (*Wallace's*) interests, understood by him and *Mr. LeNoir*, as he has asserted, to be substantially at stake in the suit he can, of course, frame his proceedings for relief accordingly.

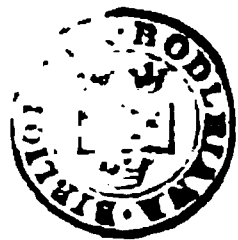
It remains for us to inquire whether *Mr. Wallace's* affidavit, in connection with the pleas to which it refers, discloses any other grounds that will warrant our making this rule absolute. Had he been made a party to the suit, it appears that his defence would have been substantially that the goods in question were subject to respond the claims of *Mr. Wallace* and others, being the creditors of the defendant, or of him and his late partner *Shaw*, by virtue of the assignment to *Wallace* above noticed, while the bill of sale of the goods to plaintiff on which his action was founded was tainted with usury, and in that respect, and in other respects, fraudulent and void. That, in this suit, (the judgment and confession being set aside) he should be placed by the interposition and order of the Court in a position to make that defence available for himself is his professed object, while his allegations last referred to in his affidavit amount to an assertion of the matters of defence which, had he been a party to the suit as supposed, he would have set up.

The affidavit also contains certain allegations pointing especially to the plaintiff, which I proceed to notice. They have not been in any manner answered by the plaintiff. *Mr. Wallace* alleges that when defendant, being a bankrupt, gave a confession, the plaintiff signed an agreement (with whom it is not stated) that he would not look to any of the other sureties on the replevin bond, but to *Wallace* alone, for the \$8000, and that then the judgment was entered up; that plaintiff was aware that *Wallace* was the principal party in the suit, and treated with him as such (how or when is not stated); that *Wallace* had several views with him about the suit, and that plaintiff attended a meeting of *Murphy's* creditors at *Wallace's* office, and as one of the creditors, after assignment made to *Wallace*, and after the action was brought; that at interviews between him and *Wallace*, with a view to obtaining a compromise of plaintiff's claim, plaintiff treated *Wallace* as the principal in the suit and the only manager thereof; that plaintiff colluded with one *Nash*, who, as *Wallace* believes, purchased plaintiff's claim, and concocted the judgment in order to defraud *Wallace* and the other creditors of the defendant. Nothing thus stated impeaches legality or the regularity of defendant's confession; and defendant in his affidavit repudiates all connection or identity of interest, or of defence with *Wallace*. It is impossible therefore, I think, to consider *Wallace* as in any respect for the purpose of what is before us, standing in defendant's shoes. Now, in relation to this application of *Mr. Wallace* and the fact before us, the first observation which seems to me material to make, is, that according to *Mr. Wallace's* statements his legal rights in regard to the property in question were paramount to those of *Hare*. He had the first registered bill of sale. He was aware of the step taken to replevy the goods. Why did he not then interpose and protect his own rights? If, as he asserts and *Mr. LeNoir* denies, he did for that purpose employ the agency of that gentleman, and he improperly abandoned the interests committed to him, to that gentleman, *Mr. Wallace* must look for redress. Our *Interpleader Act* mentioning "detinue," which is of kin to "replevin," the defendant might perhaps have interpleaded, but he did not think proper to do so. Can this Court then

interpose and set aside a judgment regularly entered on the application of one who is not a party to the record? I am not prepared to do so without a precedent drawn from a decision of authority in an analogous case. If I were to do so, it must be on the sole ground of *Mr. Wallace's* uncontradicted allegation, that this plaintiff during the pendency of his action, and before his judgment dealt with *Mr. Wallace* as the real defendant in it. That, in my opinion, would not be a valid ground. Pecuniary responsibilities would attach to this defendant as the possible result of our setting aside this judgment. How could we, as a Court of Common Law, protect him in respect of those? He in his affidavit expressly deprecates further contention in this matter. Can we disregard that, and make him a party *nolens volens* to further litigations?

I am also of opinion that if *Mr. Wallace* ever had sufficient grounds to support his application, he waived his right to the interposition of the Court by the neglect which marks his proceedings. Without violating the established rules and practice of the Court no different view of his position from that just intimated could be entertained. On the 12th of *April*, 1870, he received *Mr. LeNoir's* communication; on that day he applied to *Mr. Justice DesBarres*, but according to his own showing, in an illusory manner, and as we must infer from what he has himself stated, without an earnest and persistent design or endeavor to obtain an order from the learned Judge. What other inference can we draw from *Mr. Wallace's* language? He says: "It was on the same morning that I received the letter" (that from *Mr. LeNoir*) "that I applied to His Lordship Judge *DesBarres* to set aside said judgment; but he preferred (as I understood) to have the matter brought before the Court." Here the matter was permitted to rest until the 3rd day of *January*, 1871, when the order *nisi* which we are now considering was obtained.

For the reasons stated I am of opinion that this rule *nisi* must be discharged with costs.



BLACK ET AL. v. HALLIBURTON.

ACTION for the cost of a set of sails furnished to a vessel of which defendant was part-owner, and one McR., master. Plaintiffs had a private account with McR., and in their ledger the charge for the sails appeared in that account. They had no separate account against the vessel, and it seemed that on McR.'s becoming insolvent some time subsequent, they had received a dividend upon his whole indebtedness, including the charge for the sails. Plaintiffs called defendant as a witness, and on examination he denied that the vessel required the sails when they were purchased, but stated that he had settled with McR. for them about a year after, although he had never authorized McR. to procure them. Defendant called no witnesses, and the jury found for him.

Held, that there was no ground for disturbing their verdict.

MCCULLY, J., now, (February 4th, 1873,) delivered the judgment of the Court as follows:—

This was a rule *nisi* to set aside a verdict obtained by defendant on a cause tried before Mr. Justice *DesBarres* at *Halifax*, in the *November* sittings, 1871. For plaintiffs, *J. N. Ritchie*, Q. C., and *James McDonald*, Q. C.; for defendant, *H. Blanchard*, Q. C., and *N. Meagher*.

The action was brought to recover from defendant the amount of an order or inland bill of exchange dated 27th *December*, 1867, as follows: "Messrs. *Black & Co.*, Gentlemen, —Please pay to Messrs. *Muir & Blackadar*, sailmakers, the sum of \$184.22, *Halifax* currency, three months after date, and charge the same to schooner *Levant* and owners, for sail and mainsail, and oblige, yours truly, *Rodk. McRae*." The principal witness on the part of plaintiff was *G. Troop*, one of the plaintiff firm, substantially as follows:—The schooner was in the port of *Halifax* in *December*, 1867. The drawer of the order was on her as master, and was part owner. On the 13th *December* plaintiff supplied the vessel with rope to amount \$16.53. *McRae* ordered sails of *Muir & Blackadar* for which he could not pay. They threatened proceedings, and he (*McRae*) applied to plaintiffs and they accepted his order, witness says for schooner and owners, on credit of owners, knowing that *McRae* was not sole owner. Plaintiffs paid the draft at maturity, charging \$4.60 commissions. At the time *McRae* owed plaintiffs largely on private account. Witness did not think they would have given *McRae* this credit on private account. He had since failed, and they had received a dividend of 25 cents to the dollar, including this

account. A letter, *December* 18th, 1868, from plaintiffs to defendant, calling upon defendant for payment, and stating the circumstances under which the debt was contracted, and one from defendant in reply, dated 24th *December*, 1868, expressing surprise at the existence of the claim, explaining that while he was connected with the vessel he understood *McRae* had paid for all put upon her, and that he (defendant) had paid all, as he thought, for which he was liable, informing plaintiff that the vessel was then at *Baddeck* and easily got at, stating he had been charged for sails by *McRae*, and it had been paid out of freights per account, promising to see *McRae* and write, concluding by informing plaintiff that *McRae* was and had been owner since previous *August* of the vessel. On his cross-examination *Mr. Troop* admits that plaintiffs did not order the sails from *M. & B. McRae*, he says, stated they were necessary. He had no personal communication with defendant till 18th *December*, 1868. Plaintiff had obtained a confession of judgment from *McRae*, but he did not know if it included this demand. They ranked on his estate for this demand. "We charged the draft in account against *McRae*" (adds *Mr. Troop*), "with a memo. of the amount due us by the *Levant* owners."

Defendant was then called by plaintiffs as a witness, and testified that he was part owner of the *Levant* in *November* and *December*, 1867. He owned one-half and *McRae* the other half, *Livingstone* was master, and she traded between *Baddeck* and *Newfoundland*. They owned and sailed the vessel two or three years. Defendant says: "I paid my proportion of disbursements. But she never earned, and I never received anything. *McRae* managed the vessel and kept her account. I knew that *McRae* came up in the vessel in *December*, 1867, to *Halifax*, with a cargo of coal. She did not require sails at that time, as the sails she had were sufficient. Did not know she got any till plaintiff's letter to that effect long after. Did not settle with *McRae* for sails before 24th *December*, 1868." On his cross-examination he says: "I paid *McRae* for the sails and rigging. Never was consulted as to getting the sails, and never gave any authority to get them. Defendant says he got credit for other freights besides the coal."

Troop recalled.—On reference to books found the plaintiffs did not rank on *McRae* estate for this claim. Cross-examined.—“I believe the word *Levant* was written in pencil by our bookkeeper in this book (plaintiffs’ ledger) at the time the entry was made against *McRae*, and that the balance of \$1255.65 included the items supplied to *Levant*.” Re-examined. “The pencil entry on ledger was made 31st *December*, 1867, when account rendered to *McRae* of *December* 19, 1878, which it will be seen was about a year and twelve days after. The goods supplied *Levant* were not included in it.” Plaintiffs rest, and defendant’s counsel moved for a nonsuit, which was not ordered.

Defendant called no witnesses, and upon this state of facts with a verdict found for defendant, we are invited to set it aside and grant a new trial upon the grounds of misdirection and as against law and evidence. *J. N. Ritchie*, Esq., Q. C., who opposed the rule, made no point as to misdirection by the learned Judge, nor so far as my minutes taken exhibit, was any portion of the learned Judge’s charge challenged either by himself or his colleague in reply to *Mr. McDonald*, except these. His Lordship, he contended, should have directed the jury to find under the evidence that *McRae* was a general agent for owners, and as such possessed authority to bind defendant. But this would have been in this case equivalent to a positive direction to the jury to find for plaintiff, in the very teeth of the statement and testimony of defendant, called as a witness by plaintiff, who positively swore that he had paid his proportion of the disbursements. He says that the schooner at the time did not require sails, as the sails she had were sufficient for her winter work. Further, “I paid *McRae* for the sails and rigging,” although he admits he had not settled with him for the sails before the 24th *December*, 1868. He says: “I was never consulted as to the getting of the sails and rigging, and never gave any authority to get them; adding, ‘I live in *Baddeck* where there is a telegraph office, and a mail five times a week.’” With such testimony as this on the minutes, and produced by the plaintiff himself, though from the mouth of defendant, yet risking what he might have to admit adverse to his interests, the strongest portion of which was at line 64, where he says,

"*McRae* managed the vessel and kept her accounts," I cannot by any means admit that the learned Judge was wrong in leaving it open to the jury as he did, when he told them that "if they could arrive at the conclusion that *McRae* with defendant's consent acted as the ship's husband, then he had a right to pledge the credit of defendant for necessary supplies." But then there arises the question,—were these sails necessary supplies? Plaintiff's own witness declares, as already remarked, that they were not, and if not, what then? I confess I am at a loss to know upon what principle this Court can be called to challenge the functions of the jury exercised in believing or disbelieving the testimony of witnesses produced by a plaintiff as in this case, and then from drawing their conclusions accordingly.

But it seems to me that it was neither an unimportant nor an insignificant fact here that the original entry in plaintiffs' books was not in the usual form, viz., "Schooner *Levant* and owners to plaintiffs, Dr." The pencilling in the book not positively verified by the party who made it as to when made and no explanation why the bookkeeper who made the entry was not called, may itself not have been satisfactory to the jury. And if this credit was originally given to *McRae*, as the entry made in the book, without the pencilling, would seem to warrant, or at least leave an open question, then by what ingenuity could it be maintained that defendant, the co-owner, can be held responsible?

The law and the several cases cited on the argument, which I need not reproduce, are not, as it seems to me, capable of being questioned. The case of the *Great Eastern*, 2 L. R. Adm., 17 L. T., N. S., 667, Fish. Dig., 7897, affords a safe guide as to the power of a master to bind the owner. There the law is laid down thus: "The liability of an owner to pay for repairs and equipments ordered by the master, depends not upon the ground of ownership of the vessel, but upon the ground of a contract made with the vendor" (here *M. & B.*) "by a person who was the owner's agent, for the purpose of ordering such necessaries," "And the master's contracts cannot bind the owner unless authority to bind the owner has been actually given him, or unless the owner has by word or deed held out the master as his agent, and thereby induced

the vendor to supply the necessities on the credit of the owner." Such is among the latest rulings as regards the relation of master and owner, and the power of the former to bind the latter. Then as regards the general liability of owners; although it is true that whoever supplies a ship with necessities has a treble security, 1st, the master, 2nd, the ship, and 3rdly, the personal security of the owners; *Brit v. Coe*, Cowp., 639, Fish., 7891; yet the registered owner being *prima facie* liable for goods furnished for the use of the ship, such liability may be rebutted by evidence of the credit being given to others; *Cox v. Reid*, 1 C. & P., 602. In this case defendant, as plaintiff's witness, has positively negatived the position that the sails were necessities, and secondly his counsel contended that the credit was given to *McRae*. And surely it cannot be denied that there was some evidence upon both points for the jury's consideration,—not only some evidence but strong evidence, especially upon the point of "necessaries." See also the strong case of *Briggs v. Wilkinson*, 7 B. & C., 30, 9 D. & R., 871. In *Maddox v. Miller*, 1 M. & S., 738, it was held that if any of the goods furnished an infant may fall within the description of "necessaries," the evidence ought to be left to the jury, *a fortiori*. The evidence whether these sails were or were not necessary for the *Levant*, was a question, *the question*, it seems to me, for the jury. And by their verdict they have negatived this assumption, or they have negatived *McRae's* authority, or that credit was given to defendant, or all of these propositions together, and any one of the three negatived, entitles the defendant to the verdict rendered.

Moreover, it is a feature of this case that plaintiff did not advance this money to Captain *McRae* to purchase necessities, much less is the suit brought to recover for necessities supplied by themselves for the *Levant*. The original credit to ship and owners, if any such were given, was the credit of the supplying firm of *M. & B.* to *McRae*. They furnished the sails and then threatened to libel the schooner, so says *Mr. Troop*. Whether they could successfully have done so is not the question here. The real question, it will be seen, assumes quite another phase, where the master and part owner has contracted a debt, even for necessities, and having got into

trouble goes abroad to procure funds or procure a guarantee as here by a third party's acceptance, to what it would have done had the sails been necessities, and as such been purchased of and supplied by plaintiffs to the master as such. In *Probart v. Knouth*, 2 Esp., 472, *per Buller*, it was held "that an infant is not liable for money lent to supply himself with necessities," much less, I should say, for money advanced to repay a creditor who had previously advanced or supplied goods or necessities. I can, therefore, easily understand that *Muir & Blackadar* might in this case have an action against the owners or co-owners of the *Levant*, and yet the plaintiff have no action against him for money supplied after a third party, who had given credit and supplied the necessities, began to press for pay. In *Gore v. Gardier*, 3 Moo. P. C. C., 79, it was held that a bottomry bond given by a master, upon a threat of arrest for supplies previously furnished on his personal credit, was void. For if the master can obtain supplies on his personal credit, he is not justified in resorting to a bottomry bond. See *Soares v. Rahna*, 3 Moo. P. C. C., 1.

Such would seem to be the law on this branch of the case, and I very much doubt, even if the sails were necessities, if *McRae* could pledge defendant's credit as owner to plaintiffs, to raise funds to ward off the threatened procedure of *Muir & Blackadar*. But the jury having, as I think, ample material to found their verdict upon, independent of this objection, which was not raised on the trial or argument, if they preferred defendant's positive averment, either as to the question of the sails not being necessities, or as to *McRae* not having authority, to the inference that arises in law of authority possessed, from the fact of *McRae* having managed the vessel and kept her accounts, and it surely was peculiarly within their province to do so; I am unable to discover any reason for disturbing the verdict. Whenever there is evidence for the consideration of a jury, and they are required to pass upon it, even if the conclusion they arrive at may not be such as the presiding Judge would have wished, still this Court will be slow to disturb their finding, and would, I am apt to think, require to be thoroughly convinced that gross injustice would follow unless there was a new trial. This cause can hardly be said to fall within that principle, and I think the rule *nisi* must be discharged.

CARR v. CAREY ET AL.

PLAINTIFF transferred his horse and truck, &c., to McC. under a verbal agreement, which was afterwards reduced to writing, and subsequently, when on oath denied all right of property in the goods. McC. transferred them by bill of sale to defendant, from whom plaintiff sought to replevy them, and at the trial offered in evidence his agreement with McC., which was rejected by the Judge, on the ground that it was not properly signed.

Held, that plaintiff could not prevail in his action.

MCCULLY, J., now, (February 4th, 1873,) delivered the judgment of the Court as follows:—

This was an action of replevin tried before Mr. Justice *DesBarres*, November sittings, 1870, the subject of the controversy being a horse, truck and harness. A verdict passed in favor of the defendant, and a rule *nisi* sued out under the statute to set it aside, and for a new trial, now came on for argument. *Mr. McDonald*, Q. C., for plaintiff, *Mr. Weeks* for defendant.

There was a great mass of evidence reported, much of it conflicting and contradictory. *Carr*, the plaintiff, was the original owner of the property, and transferred it to *W. McCormack & Co.*, defendant, by a verbal arrangement, as he affirmed, the substance of which was that he was to have it as long as he behaved himself. This was subsequently reduced to writing, and a paper purporting to contain the terms entered into between the parties shortly before the action commenced, was tendered in evidence by plaintiff, and rejected by the learned Judge, on the ground that having been signed by *Carr* as a marksman, it had not been read and explained, and was therefore not properly executed. That the plaintiff was originally the proprietor of the property there is no room for doubt. That he transferred it to *McCormack*, who had it in his possession and used it as his own, is equally clear. That on one occasion after this, in the Police Office, he (plaintiff) stated publicly "that he had no claim to the mare, truck or harness; that he had given the mare to *McCormack* to make his living; that he had at that time no claim on the mare; that the mare, truck and harness were *McCormack's*," is language (extracted from the Judge's minutes who tried the cause) used by plaintiff on his cross-examination, and testified to in still more unqualified language by several witnesses called on the part of the defence.

The defence was a judgment against *McCormack* at *Carey's* suit, a levy, and that *McCormack* had transferred to *Carey* the principal and the real defendant, all his right and title thereto by a bill of sale dated 9th October, 1869, accompanied by possession on the 13th. *Carey* had made payment or advanced money to *McCormack*, he says some \$13 in all (*Carey* says \$20, \$15 at the date of the bill of sale), at different times, and it and the paper to plaintiff, it appears by *McCormack's* testimony, were signed the same day, that to plaintiff first, and *McCormack* delivered the mare, at *Carey's* request, and put her in possession of *Doran*. She was replevied afterwards while at *Joseph Kay's* stables.

Carey, defendant, testifies to plaintiff's statement at the Police Court, on oath, denying all right of property in the goods. *Thomas Peters*, a witness, corroborates the disclaimer, and testifies to his words, thus: "I (plaintiff) have no claim to the property, good, bad or indifferent." *James Walsh* confirms the previous witnesses, and *Michael Laughlin* repeats the statement.

The learned Judge who tried the cause thought the plaintiffs could not maintain this action under the evidence (a very small portion of which I have thought it necessary to transcribe) without a previous demand of property, or paying or offering to pay the amount advanced to *McCormack*. But I am at a loss to see how any demand or offer could have effected the legal rights of the defendant *Carey*, or under what hypothesis *Carr*, if he spoke the truth at the Police Office,—and it is not in his power now to deny it,—by what ingenuity he could hope with or without a demand, with or without a tender, to prevail in an action such as this. The contents of the bill of sale, though the instrument was not read and was rejected, came out incidentally on the trial, and the amount was used on the argument, and its contents then descanted upon fully. The Court now has full information as to what it contains, and it in no way strengthens plaintiffs' case that I can perceive. *Annands v. Barker*, 2 Tyr., 140, 2C. & J., 133, shows plainly that under such circumstances the rejection is no cure or ground for a new trial. See also *Crease v. Barrett*, 1 C. & M. & R., 919; also *Don. Ed. Welsh v. Langbed*, 16 M. & W., 497. I think the rule *nisi* should be discharged.

DECISIONS
OF THE
SUPREME COURT OF NOVA SCOTIA,
JULY TERM, 1873.

HENDRY v. SCOTT.

DEFENDANT made and delivered to plaintiff a memorandum (not under seal) in the following terms: "I do hereby agree to lease to you, Wm. Hendry, the privilege of light in the west side of your building, &c., for a term of ten years, from this date, at a yearly rent of twenty-five cents per annum."

Held, that the memorandum constituted a mere license revocable at defendant's pleasure.

WILKINS, J., now, (July 15th, 1873,) delivered judgment as follows:—

I think that the written instrument on which this action is founded, while it clearly has no efficacy to confer on the plaintiff an easement of light, cannot be viewed as an agreement that can sustain an action for damages. There are authorities to show that though a written instrument cannot operate as a deed of transfer, it can take effect as an agreement, if there be matter of executory contract in it. It would seem, however, to be necessary that there be a valuable consideration, and that no present interest pass in respect of the matter, which is treated as contract executory. *Bond v. Rosling*, 1 B. & S., 371; *Hayne v. Cummings*, 16 C. B., (N. S.,) 421; *Smart v. Jones*, 15 C. B., (N. S.,) 723. In the last case *Willes, J.*, said: "It appears to me that in this case no difficulty at all arises with reference to the common rule as to the grant of an incorporeal hereditament, because the plaintiffs do not assert that they are entitled to any actual interest

enabling *Lewis* (the bankrupt represented by the plaintiffs) to enter on the land." In that case there were matters of executory contract on which the Court decided,—here there are none; for this paper either conveyed the easement of light, at the date of it, or it was inefficacious in any respect whatever. At least so I understand it. The defendant in the latter part of his second plea says "that he did not enter into any agreement with plaintiff for a lease, in the terms in his said writ and declaration set forth;" (plaintiff has assigned the not executing a lease as a breach), and "he denies all mutuality in said agreement, and avers that the same is void." In his last plea he alleges "want of consideration, illegality, and that the agreement is void." But if the writing can be regarded as merely executory, is it valid? Viewed in that light defendant's stipulation seems to me to be gratuitous and unsupported by any consideration. The breach alleged is non-performance of the agreement, and no consideration is stated in the agreement in connection with an executory contract. The twenty-five cents per annum cannot be regarded as a consideration for such, for it is plainly expressed as a compensation fixed prospectively for each future year's enjoyment of the privilege leased, and is not an ingredient in an agreement to lease. If, indeed, it could be viewed in that light, it would not be a substantial consideration that could be supposed sufficient to have induced a reasonable man to subject sixteen feet by eight of the ground area of his valuable land in this city to remain unbuilt upon and unprofitable for ten years. There is no mutuality, but it is unilateral. Suppose plaintiff had chosen to say, after the agreement was signed by the defendant (who alone signed it), "I don't want light over your area. I have concluded to close my western windows, and light my building through the roof," defendant could not compel plaintiff to accept the light and pay the rent. (*Add. Cont.*, 13, 14.) Observe this *American* case, *Murdock v. Caldwell*, 8 Allen, 309. The declaration was as follows,—“and the plaintiff says that he and the defendant entered into a contract together, a copy whereof is annexed. And the plaintiff has always been ready to perform the contract on his part but the defendant has disabled himself from performing said contract, and has pre-

vented the plaintiff from performing the same." The contract was as follows:—"Boston, May, 23rd, 1863.—I do hereby agree to deliver to *A. Murdock*, upon the formation of the *Luburg Coal Co.*, when the certificates are issued, \$35,000 in the stock of the said company, at *pro rata* of \$250,000 valuation; and he does in consideration of the delivery of the said stock, agree to sell and collect \$50,000 of said stock, upon the value above referred to, viz., \$250,000; and he is to receive a reduction *pro rata*, from said \$35,000, if he falls short of that amount \$50,000 in cash subscriptions, the stock to be sold and paid for by the 25th of *June*, 1863, if the company is formed by that date.—*Josiah Caldwell*." The defendant filed a demurrer assigning the following cause: "Because the plaintiff does not allege in his said declaration, nor does it appear by said contract that there was any consideration for the defendant's entering into the same." The case was reserved for the consideration of the whole Court. *Chapman, J.*—"By *General Statutes*, chap. 129, sec. 2, a plaintiff is allowed to omit all averments which the law does not require to be proved, and to set forth the substantive facts necessary to constitute the cause of action with substantial certainty. He may set out a copy of the agreement, &c. The plaintiff declares on a contract not under seal, and annexes a copy. But as the copy is signed by the defendant only, and purports to be merely his agreement with the plaintiff, and as the declaration merely avers that the parties entered into that contract, there is no proper averment of a consideration. It is true that the contract of the defendant states certain things that the plaintiff has agreed to do, but it contains no promise of the defendant to do them; and there is no averment that he made such promise. His promise, if it constituted the consideration, should have been set forth with substantial certainty; for it is one of the substantive facts necessary to be proved. The cause of the demurrer is well assigned. Judgment accordingly." In *Bates v. Cort*, 2 B. & Cr., 474, the declaration stated that by agreement between plaintiff and *G. G.*, plaintiff agreed to sell and deliver to *G. G.* a lace machine for £220, to be paid thus, £40 on delivery, and the residue by weekly payments of £1, which were to be paid to defendant as trustee for the plaintiff, and in case

of any default plaintiff was to have back the machine; and in consideration of the premises, and of plaintiff at the request of the defendant appointing him to receive the weekly instalments, defendant promised the plaintiff to take the machine and pay the balance, should there be any default by G. G. in weekly payments. Held that this promise was *nudum pactum* and void. Demurrer to declaration. *Per curiam*.—“The declaration affects to show the legal operation of the agreement. Now that states that the agreement bound the defendant to take the machine, not the plaintiff to deliver it. There certainly is an allegation of willingness to let defendant take the machine, but that does not appear to have been in pursuance of any pre-existing agreement, nor does the whole import any obligation on the plaintiff to let the defendant take it. The declaration is therefore bad, no sufficient consideration for the defendant's promise being shown.” See *Britten v. Webb*, 2 B. & Cr., 483; see, also, on the subject of consideration in a written instrument not under seal, 7 T. R., 350, note a. Whether an instrument operates as a present lease or as a mere executory agreement for one, is a pure question of intention. See *Strattan v. Pettill*, 16 C. B., 420, and the exhaustive decision in *Doe v. d. Morgan et al. v. Powell*, 7 M. & Gr., 980; also, *Jackson v. d. Ludlow v. Myers*, 3 Johns., 388. Tried by those cases, there cannot be a doubt, I think, that if this paper operated at all, it took effect as conferring an interest *in presenti* at the moment of its execution by the defendant. There is nothing executory in the language of it. It runs thus: “I do hereby agree to lease to you Wm. Hendry, the privilege of light in the west side of your building which fronts on Jacob street and private lane, over a space on the west side of said building, extending from the north end of said building southerly about sixteen in width eight feet, for a term of ten years, at a yearly rent of twenty-five cents per annum. There is no stipulation for the execution of a more effect, to effectuate the intent. The privilege begins in point of enjoyment at the date of the deed and the first payment of the twenty-five cents is due at the expiration of one year from the day when subscribed. It is unnecessary to cite authori-

ties to show the inefficacy of the paper (viewed in any manner) to confer an easement of light, or to shew that it did not pass a license irrevocable to enjoy the easement for the period of time named. *Wood v. Leadbitter*, 13 M. & W., 842, alone need be referred to as decisive. In that case Mr. B. Alderson, in his learned judgment, said (p. 845): "Where there is a license by parol coupled with a parol grant or pretended grant of something, which is incapable of being granted otherwise than by deed, then the license is a mere license; it is not an incident to a valid grant, and it is, therefore, revocable. Suppose the case of a parol license to come on my lands and there to make a watercourse to flow on the land of the licensee. In such a case there is no valid grant of the watercourse; and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the license would be irrevocable." The learned Baron remarked, in the conclusion of his judgment, "it was suggested that, in the present case, a distinction might exist, by reason of the plaintiff having paid a valuable consideration for the privilege of going on the stand; but this fact makes no difference. Whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed. Any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going on the stand in spite of the owner of the soil; and it is sufficient on this point to say, that in several of the cases the alleged license had been granted for a valuable consideration, but that was not held to make any difference."

Mr. Gray, at the argument, took the position that the legal effect of the paper was to confer on the plaintiff a license irrevocable; but that such a position is untenable, and that, even if it were otherwise, the licence was revoked and at an end on the instant that the defendant conveyed away (as it is proved he did) the area in question, are clear results of the authorities. See the words of Lord Abinger and of *Parks, B.*,

in *Wallis v. Harrison*, 4 M. & W., 543. The former said: "A mere parol license to enjoy an easement on the land of another does not bind the grantor after he has transferred his interest and possession in the land to a third person." *Parke, B.*, said: "I take it to be clear that a parol executory license is countermandable at any time, and if the owner of the land grants to another a license to go over, or do any act on his close, and then conveys away that close, there is an end of the license, for it is an authority only with respect to the grantor, and if the soil ceases to be his, the authority is instantly gone." There of course can be no difference in principle between a contract to permit water to flow over the area of a man's close, and a contract to permit light to flow over a man's close. The contract in either case respects an incorporeal hereditament in relation to land.

It may be noticed that the declaration contains an averment (one very likely to have influenced the large, and as I think, unreasonable damages given,) which is not sustained by proof. The averment is that plaintiff, relying on the defendant's said agreement, proceeded with his said buildings to the completion of them, and in order to avail himself of the benefit of the said agreement, and of the light thereby stipulated and agreed for, the plaintiff caused to be opened and set in on the western side of his said building, &c., certain windows looking upon the space so agreed for, &c. Now here, the plaintiff avers that he set the windows in his said building subsequently to the agreement (meaning, of course, the written agreement set out), but which we have proof was signed on the day of its date. The minutes do not show that the structures necessary for introducing light into the building, over the area, were made after the paper was executed by the defendant and on the faith of it. The windows may have been set in after the verbal agreement spoken of by the plaintiff as a witness, but it does not appear that they were made after the written agreement—the only one mentioned in the declaration—was signed by the defendant.

For the reasons which I have stated I think this rule to set aside the verdict should be made absolute.

THIBEDEAU v. RYERSON.

H. K. R., having been employed by defendant to build a vessel for him, employed plaintiff as a sub-contractor to plank her. Defendant executed and delivered to plaintiff a guarantee, based upon an agreement between the latter and H. K. R., for the performance of the sub-contract, which had been drawn up but was not signed. A clause varying its terms having been added to the agreement subsequent to the giving of the guarantee.

Held, that the effect of the variation was to relieve the defendant of all liability on the guarantee.

SIR W. YOUNG, C.J., now, (July 15th, 1873,) delivered judgment as follows:—

The defendant having a vessel built for him at *Salmon River* by *H. K. Richards*, who had employed the plaintiff to plank her, gave plaintiff a guarantee founded on an agreement made between *Richards* and the plaintiff, which is as follows:

“*Henry K. Richards*, of *Salmon River*, *Digby County*, Province of *Nova Scotia*, ship-builder, and *John Thibedeau*, of *Meteghan*, County and Province aforesaid, agree as follows, viz, the said *John Thibedeau* agrees to dub planks, square and re-square wales, to drive on bolts either of iron or copper, also treenails, put in all graving pieces. In fact so complete the outside of the ship now building by said *Richards* from keel to gunwale, except boring, joinery and caulking, and to do the job in a workmanlike manner, to the entire satisfaction of *Jacob S. Allen*, the master-builder, and to have the job completed without unnecessary delay. *H. K. Richards* agrees to pay for the above job the sum of thirty-four dollars per streak, so fast as the work progresses for every streak now to to be put on. Also to furnish material without unnecessary delay, to find ring bolts, four butt screws, neveropes, wedges, &c., except augurs. *Richards* to board the men free of charge, except men loafing without cause. And for the true performance of each and every part of this contract we each bind ourselves in the penal sum of one thousand dollars.

“In witness whereof we have hereunto set our hands and seals this fourteenth day of *August*, in the year of our Lord one thousand eight hundred and seventy-two.

“The said *Richards* further agrees that if the price is not sufficient after paying the men whom *Mr. Thibedeau* hires to

the best advantage he can, to pay the said *John Thibedeau* three dollars per day for every day he may work; the job to be commenced on *Monday*, the nineteenth of *August*.

"HENRY K. RICHARDS,

"JOHN THIBEDEAU.

"JOSEPH BABINE."

When the defendant signed the guarantee, the agreement, though prepared down to the date, had not been actually signed, and the subsequent clause was added without the knowledge or consent of the defendant, as found by the jury, though on that point the evidence of the parties differed at the trial. The meaning of this clause admits of some doubt. It would appear to secure \$3 a day to the plaintiff, and to have no other effect; but it was not so considered by him when he brought his action. Of the fifty-two streaks in the ship it was assumed at the argument that ten, and not eight as the plaintiff said, were on the vessel when he began. This leaves forty-two, which at the rate of \$34 per streak would come to \$1428, and deducting \$641, payments by *Richards*, the balance due to the plaintiff would be \$787. But the plaintiff claimed on this action \$1134, made up of men's wages \$1478, and his own \$297, and crediting \$641 as before.

Now it is obvious that on no point of view could the defendant be made liable for the difference between these two sums, and that the plaintiff could not sustain his action as he has set out the agreement and made his demand. *Richards* has become insolvent, and if the vessel which the plaintiff duly completed according to his contract has passed into the hands of the defendant, as would seem to be the fact, without having paid *Richards* or any one else for the planking, the Court from a sense of justice would be unwilling to remit the plaintiff, and probably the workmen who were employed by him and have not been paid, to *Richards'* insolvent estate. Still we must administer the law as we find it, and deal with the argument which was strongly pressed upon us, that the alteration of the agreement discharged the defendant not in respect only of the difference between the two demands, but of his whole liability. It is to be observed that there is no ambiguity in this guarantee. The defendant was to see the

plaintiff paid for his job, provided said job was completed according to agreement with *Richards*,—not an agreement to be thereafter made, but a subsisting agreement known to both parties when the guarantee was signed. The case, therefore, differs entirely from that of *Creighton v. Ryerson*, which turned upon the meaning of the word “arranged,” as used by the defendant, and where I held it to be the rule of law that if the party giving a guarantee leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself, and cited various authorities for that position. Here the jury have found in answer to a question put to them by the Judge who tried the cause, that after the defendant executed the guarantee, the agreement that existed at that time between the plaintiff and *Richards* was altered, and a new agreement of a different kind made between them, without the knowledge and consent of the defendant.

The rule of law is to be found in all the text-books; *Smith's Merc. Law*, 472; *Parsons' Merc. Law*, 67; *Addison on Contracts*, 576; *Burge on Suretyship*, 214. It is laid down more emphatically in the last than in any of the others, that “any subsequent addition to, or deduction, or abstraction from the contract, is such an alteration as discharges the surety.” In *Miller v. Stewart*, in the Supreme Court of the *United States*, 9 Wheat., 703, Judge *Story* said: “Nothing can be clearer, both on principle and authority, than the doctrine that the liability of a surety is not to be extended by implications beyond the terms of his contract. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he do not assent to any variation of it, and a variation is made, it is fatal.” So also in the note to the *American* edition of 1 *L. & E. Reps.*, 8, it is said: “If the contract has been altered in the slightest particular without the assent of the surety, he may say, ‘*Non in hæc foedera veni.*’ ”

This principle lies at the root of the *English* decisions as well as the *American*. *Eyre v. Bartrop*, 3 Madd., 221; *Bonser v. Cox*, 6 Beav., 110; *Gardner v. Walsh*, 5 El. & Bl., 89. In this last there was an alteration of the note declared on in

a material point, and the Court held that the surety was discharged from his liability where the altered instrument would operate differently from the original, whether the alteration were or were not to his prejudice.

On these authorities it is clear that if *Richards*, after the guarantee, had agreed with plaintiff to raise the price per streak (or, as it would seem, to diminish it), the defendant would be released. Now upon any construction of the guarantee the cost of the work has been raised ;—the contract, however innocently or incautiously, has been varied in a material point, and I am forced to the conclusion that the defendant is therefore entitled to our judgment.

DEWOLF v. PUNCHARD ET AL.

DEFENDANTS were empowered by statute to enter and take possession of lands required for the track of their railway, stations, etc., the lands taken to be laid off by metes and bounds, and a plan and description of it recorded in the Registry of Deeds for the county where the land was situate. The statute stipulated the extent of land to be taken.

Held, that the company could not, by making a survey or filing a description, acquire a title to private property lying beyond the statutory limits.

Wharfage is recoverable under counts of *Indebitatus Assumpsit*, that being the proper form in which to proceed.

MCCULLY, J., now, (July 15th, 1873,) delivered judgment as follows :—

The writ in this case is that commonly called *Indebitatus Assumpsit*, with a single count, and plaintiff claims \$500 for the “ wharfage of goods and chattels landed, stored and kept by plaintiff in and upon a wharf and premises of plaintiff for defendants, at their request ; and for dockage of vessels moored in a dock and premises of plaintiff for defendants, at their request. The plaintiff’s particulars are \$565.25, amount of account rendered 1869. Defendants say they never were indebted to plaintiff as alleged. Thus stands the record.

The facts, briefly stated, are as follows : Plaintiff was the proprietor and possessor of a wharf and premises at *Wolfville*. Defendants were the contractors for building the *Windsor & Annapolis Railway*, and, while so engaged, persons in their employ had used the wharf for landing rails, &c. But the

question decisive of the case is,—Did this wharf, (the portion used by defendants and their servants,) at the time when so used, belong to plaintiff, or did it with the other lands, &c., taken by virtue of section 11 of chapter 70 of the *Revised Statutes*, pass to the *Windsor & Annapolis Railway Co.*, who had their surveys made and plans recorded before the date of plaintiff's claim. By that section, while the commissioners or contractors may enter and take possession of lands required for the track of a railway, or for stations, and shall lay off the same by metes and bounds, and record a description and plan in the Registry of Deeds for the County where the lands are situate, and the same shall operate as a dedication to the public of such lands; all of which is applicable to defendants' position, yet the statute stipulates, and wisely, that the lands so taken shall not be less than four rods, (this is for the protection of the public, I take it,) nor more than six rods in breadth for the track, exclusive of slopes of excavations and embankments, except where it may be deemed advisable to alter the line or bend of any public or private carriage road, &c. And at each station a sufficient extent for depot, &c.

Now the evidence of the witnesses proved beyond all doubt that if defendants are limited in the quantity of land to be taken under the last clause of the section, plaintiff at the time was proprietor of the further end of the wharf, and I hold that defendants are so limited, as well as those under whom they seek to justify. I do not think it necessary or requisite to recapitulate the evidence of the witnesses, who testified as to the distance from the centre of the track wharfward, and clearly by no construction of the words of the statute could they get within some twenty feet and upwards of the end of plaintiff's wharf. His right to so much of his wharf as the statute did not take from him remained with him, no matter how far the contractors surveyed beyond the statutory limits, or what the description recorded in the Registry of Deeds office. The survey and registration, within the language of the statute, passes title beyond doubt, but any attempt to overreach the statute by including larger quantities, and taking possession of private domains thereunder, must be futile.

Thus much for plaintiff's title. Now as to the other branch of the case. "Wharfage," says *Worcester*, in his Dictionary, "is the fee paid for loading goods on a wharf or shipping them off," and for this he cites the *Cyclopædia of Commerce*, and "Dockage" he defines as charge for the use of a dock for ships. These, I apprehend, are as well the legal as the popular constructions of the terms "wharfage" and "dockage." The contention on the part of defendants' counsel was, that under the evidence and the law the plaintiff could not recover wharfage or dockage in this action. But my researches leave not a shadow of a doubt on my mind that not only can wharfage, warehouse use, moorage of ships, and the like, be recovered under counts of *Indebitatus Assumpsit*, but that it is the proper form of proceeding, and the very one a skilled pleader would adopt. See *Chitty's Pleading*, vol. 2, p. 29, 6th American ed., from 5th London ed. The defendants' having used and enjoyed the plaintiff's wharf and premises as in this case, the law raises an implied contract that they will pay a reasonable sum for their use and occupation of them. The books of forms from *Morgan* down to *Bullen & Leake*, are uniform in furnishing a count in *Indebitatus Assumpsit*, as that under which wharfage, lighterage, and warehouse room are to be recovered. Boomage, the use of buoys and sea-marks, moorage, pilotage and salvage, are all recoverable in like manner. *Ch. Pl.*, vol. 2, p. 65. Then again *Selwyn* in his last edition, *N. P.*, p. 85, says it lies for tolls, such as passing along a way, that is, passing over the soil of another in a way not a highway; for storage, by the owner of a market, and that without any contract between him and the owner of the stall; for weighing, &c.

Having clearly, as I think, shown that the title to the wharf, or a portion of it, is, and ever for the last forty years has been in plaintiff,—and it is here defendants' contention fails them,—I see nothing in this case to take it out of the ordinary daily transactions in every sea-port,—never, so far as I have ever known, questioned before,—the right of a wharfinger to recover his wharfage. I think the rule *nisi* for a new trial should be discharged with costs.

RICKARDS v. RICKARDS.

It is not competent to the Court to set aside an award for error of judgment on the part of arbitrators in the absence of misconduct or mistake.

An award will not be set aside or sent back for neglect on the part of arbitrators to decide separately each of several matters referred to them, when it is not clearly expressed in the reference that the matters referred are to be so decided.

RITCHIE, E. J., now, (July 15th, 1873,) delivered judgment as follows:—

The application in this case is to set aside the award made therein, on the following grounds, viz., that one of the arbitrators and the umpire were guilty of partiality and gross misconduct; that the umpire made the award without hearing or examining the evidence; that the award was uncertain, and did not decide all or any of the matters referred; that the award was not made in the terms of the submission, which required an award in relation to the several matters referred, embracing several and independent interests; that it was not final on all the matters submitted.

The charge of misconduct on the part of the arbitrator and umpire, by whom the award was made, has been satisfactorily answered. They seem to have carefully investigated the matters submitted to them, and to have exercised their best judgment in making their award, and if they have erred in the conclusion at which they have arrived, it is not competent for us to set aside the award on that account, in the absence of misconduct or mistake. It was to their judgment the parties voluntarily referred the case.

In *Hodkinson v. Ferrier*, 3 C. B., N. S., 189, Cockburn, C.J., said: "We have no jurisdiction. The modern cases cited certainly go the length of deciding this, unless there be something on the face of the award to show that the arbitrators proceeded upon grounds which are not sustainable in point of law, the Court will not entertain the objection to it. The parties here have selected their own tribunal, and they are bound by the decision, be it right or wrong." All the Judges concurred, and Willes, J., said: "The parties agreed to take the opinion of the arbitrator instead of the Court and jury. We should be acting contrary to the agreement of the parties

and without jurisdiction; an exception has been introduced in the case of a mistake in the law on the face of the award. I do not say that my reason assents to that exception,—we are bound by the course of decisions. I regret that we are so.” See also *Phillips v. Evans*, 12 M. & W., 309.

In *Woollenburg v. Lagene*, 6 Taunt., 254, the Court refused to grant a rule *nisi* to set aside an award on the ground that the arbitrator had allowed in account premiums of insurance on an illegal voyage, and that usurious commissions had been allowed. *Gibbs*, C.J., saying: “We see no reason to grant a rule which ultimately cannot be supported.” In *Oldfield v. Price*, 6 C. B., N. S., 547, *Willes*, J., said that “if,” in that case, “there was an error, it was either an error of fact as to the value of the articles, or an error in law as to the principle upon which the damages ought to be assessed; in either case the Court cannot interfere.”

There does not appear to have been the least foundation for the charge that the umpire made the award without having heard the testimony. The two arbitrators agreed, with the consent of both the parties to the reference, to go over the accounts and settle all items upon which the parties could agree, and then to call in the umpire, and after explaining what they had done, examine together the disputed items and hear all the evidence in reference to them, which course they pursued without any objection from either of the parties interested, who were always present. *Mr. McNarry*, indeed, says that his co-arbitrator *Mr. Smith*, in explaining to the umpire what had taken place, did so briefly, and in such a way as to give but an inadequate idea of the evidence; but the only witnesses who had been examined before the reference to the umpire, were re-examined afterwards in his presence, and he does not pretend that either he or the parties to the reference made the slightest objection to the course pursued, or to the mode in which the umpire was informed of what had taken place, and there was nothing to have prevented *McNarry* from supplementing any omission. It would be most unreasonable, and in my opinion most unjust, for either of the parties, after thus sanctioning what was done, to wait to see the result of the reference, and if unfavorable raise such an objection.

I have not felt it necessary to advert to the question raised on the argument, how far the evidence of *Mr. McNarry*, one of the arbitrators, was receivable to impeach the award of the umpire and his co-arbitrator, as in all essential particulars his statements tending to cast imputations upon them, and to invalidate the award, have been so fully answered. The observations of Mr. Baron *Cleasby* in the *Duke of Buccleuch v. Metropolitan Board of Works*, L. R., 5 Eng. & Ir. App., 434-5, bear on this point, as well as on the concession and compromise which must often take place both in awards and in verdicts, of which so much complaint was made in this case.

A more important question for consideration is, whether the arbitrators were required to award separately on each of the several matters submitted to them. From the bond, under which the reference took place, it would appear that several distinct accounts and matters in difference between the parties were submitted, yet no rights or interest except those of the two parties to the reference were to be affected by the award, for, though matters connected with the estate of the late *Arthur J. Rickards*, of which they were executors, were among those submitted, yet the arbitrators were simply to ascertain the amount or balance, if any, due by either to the other of them, under and by virtue of the will of the deceased, so that awarding a lump sum as due by one to the other in respect of all the matters submitted, would work no injustice or wrong to either party, and no question of costs can depend on the mode in which the award is made, as whatever the result, or however the award was made, each party was to bear one-half.

On the argument in support of the rule much reliance was placed on the case of *Randall v. Randall*, 7 East., 81, and *Ryder v. Fisher*, 3 Bing., N. C., 874, but in each of those cases it was apparent on the award that one of the matters submitted had not been adjudicated upon. We were also referred to *Russell on Awards*, and that author says, p. 252: "An arbitrator may award one sum generally in respect of all money claims submitted to him, unless the intention of the parties as expressed by the submission be that he is to award separately some one or more of them, or that there is some legal necessity for his doing so, as for instance, to determine

the right to costs. It is true," he goes on to say, "that if the submission be ambiguous it is better to make a distinct adjudication on each head."

In *Harrison v. Creswick*, 13 C. B., 414, a great number of cases are referred to on this point, and *Parke*, B., there said: "The award is good notwithstanding the arbitrator has not made a distinct adjudication on each or any of the several distinct matters submitted to him, provided it does not appear that he has excluded any," and in the case before us it is not contended that any have been excluded.

The case of *Whitworth v. Halse*, L. R., 1 Exch., 257, bears strongly on the question. There the motion was to set aside an award or refer it back to the arbitrator, on the ground that he had not found each matter referred to him separately. By the agreement of reference after the recital of several matters in difference to be referred, it was agreed that the claims and demands of *Halse* against *Whitworth* in respect of the differences and matters aforesaid, and all matters in dispute between them, and the amount to be fixed for certain shares which were to be transferred should be, and the same were thereby referred, and the arbitrators awarded that *Whitworth* should pay to *Halse* £22,973 in full satisfaction of all claims and demands of *Halse* against *Whitworth* in respect of the differences and matters mentioned and all other matters in dispute, including the amount to be paid for the shares, &c. It was urged in support of the rule that the award did not state what amount was to be paid on account of the shares, which had been referred as a distinct matter, and ought therefore to be so found; and the two cases cited to us (*Randall v. Randall* and *Ryder v. Fisher*) were relied on. It was also contended there that, without knowing the amount to be paid for the shares, it was impossible to prepare the transfer, as the *Stamp Act* required the consideration to be truly expressed in the instrument of conveyance. The Court nevertheless held the award to be good, and that an award should not be set aside unless it was perfectly clear that it was improperly made, and open to an objection which could be raised in an action brought to enforce it; and we may adopt the language of Baron *Bramwell*, who said: "If it had been clearly expressed in the reference that the arbitrators should decide

each separate matter referred to them, the award must either have been set aside or sent back to the arbitrators, but as it is not clear we cannot do so."

As to the award being final on all the matters submitted, there seems to me to be no question. It is not asserted that all matters referred were not considered and adjudicated upon in fact, and the award states that *Walter Rickards*, after crediting him with all credits to which he is entitled, is indebted to *Jos. S. Rickards* in the sum of \$7000, which we award to be paid by the said *W. W. Rickards* to the said *Jos. S. Rickards*, in full of all the matters submitted to us by the said bond.

We are, therefore, of opinion that the rule should be discharged with costs.

THE QUEEN v. BLACK.

DEFENDANT was convicted of having received certain plates covered with amalgam, stolen from a crushing mill, knowing them to have been stolen. An application was made by the *Napier Gold Mining Company* for restitution to them of a bar of gold extracted by defendant from the amalgam. It being uncertain whether the Company or one *Shaffer* were the parties properly entitled to the gold, it was ordered that the gold be handed over to the Company and *Shaffer* on their joint receipt, or to the Company with the sanction of *Shaffer*.

RITCHIE, E. J., now, (July 15th, 1873,) delivered judgment as follows:—

This is an application made on behalf of the *Napier Gold Mining Company* for a bar of gold now in Court, on the ground that it is the property of that company, the gold having been extracted from certain plates forming part of a crushing mill of which the company was owner. The gold was found in the possession of *Black*, the prisoner, who was convicted of having received the plates knowing them to have been stolen.

The application is made under chapter 31 of the *Dominion Acts of 1869*, section 113, which provides that if any person is indicted for knowingly receiving stolen goods by or on behalf of the owner, and is convicted, the property shall be restored to the owner; and the Court before whom the party

is tried may award writs of restitution or order restitution in a summary manner.

In the indictment against *Black* there were counts for stealing the plates and the gold, and counts for feloniously receiving them, but the only counts on which he was found guilty were those for having feloniously received the plates knowing them to have been stolen. In all the counts of the indictment the property is laid as that of *Wm. E. Shaffer*, and the crushing mill from which the plates were taken as belonging to him. The jury have found, and the evidence fully justified them in finding, that the plates were stolen and were received by *Black*, he well knowing them to have been stolen, and the evidence before us shows that the gold now applied for was extracted by *Black* from the plates he so received. The difficulty which has pressed itself on my mind is how we can comply with the application of the *Napier Gold Mining Company* and order the gold to be delivered to them. Not only was the property treated as *Shaffer's* in the indictment, but the evidence before us would rather lead to the conclusion that it was so in fact. *Fraser*, a member of the company, says *Shaffer* was in the exclusive possession of the crushing mill and all the mining property of the company, and had been since *September, 1871*; he does not say upon what terms, but *Shaffer* himself says that he was in exclusive possession of them when the plates were stolen, that he had taken them for a year, and that his possession covered the crusher, and that he was working it crushing gold. He describes the plates as of copper, so arranged as to catch the gold that escaped from the batteries while the quartz was being crushed; that they became valuable by use as they acquired a coating of amalgam consisting of gold and quick-silver, and that there was an accumulation of this on the plates in question, and we are told that the gold and quick-silver was obtained from the plates by scraping them. We have not been informed whether or not this scraping would injure them or whether the lessee had or had not the right to scrape them from time to time during his lease and obtain the gold from them.

In the uncertainty in which this question is left by the evidence, coupled with the statement in the indictment that

both the plates and the gold were the property of *Shaffer*, we cannot, I think, order the gold to be handed over to the *Napier Gold Mining Company*. The re-delivery of the gold to *Black*, under the circumstances, appears to me to be out of the question. Assuming, as we are justified in doing from the evidence before us, that it is the identical gold taken from the plates he has been convicted of having feloniously received knowing the same to have been stolen, and, as the gold belongs to *Shaffer* or the *Napier Gold Mining Company*, it may be delivered to them on their joint receipt, or to the company, with the sanction of *Shaffer*.

TAYLOR v. ARCHIBALD.

PLAINTIFF and defendant entered upon land under claims of title derived from the same ancestor, and exercised similar acts of ownership. Some years after his entry plaintiff received a deed of the land from an uncle who, though he claimed the whole was entitled at most to one-half. After the making of the deed and down to the time of bringing the action, both parties continued to exercise acts of ownership, as before.

Held, (WILKINS, J., dissenting,) that plaintiff had not such an exclusive possession of the lot as entitled him to bring trespass against defendant.

RITCHIE, E. J., now, (July 15th, 1873,) delivered judgment as follows:—

This was an action of trespass to land, and the plaintiff in support of his case produced a deed from *Archibald Taylor* to himself, dated 7th *January*, 1846, of premises described as follows: "All the back lands in the township of *Truro* belonging to the estate of the late *Matthew Taylor*," which was registered on the 20th *February*, 1857. The land in dispute lies on *Wilson's Mountain*, in the township of *Truro*, and is said to be a back lot.

The plaintiff, after he obtained the deed, cleared four or five acres, and had a surveyor to run round the lot thirty-four years ago, which would be about ten years before the date of the deed. He also says he first chopped on the land fifty years ago, and at the time of the survey had between three and four acres in grain and under fences. These fences have gone down, and for the last twenty-four years he has only cut wood upon the lot. It appears, however, from the plaintiff's

testimony, that *David Archibald*, the father of the defendant, cut wood on the lot twenty or thirty years ago, and that the defendant has cut wood on it for several years past, claiming a right to do so. *Archibald Taylor*, who gave the deed to the plaintiff, his nephew, was a son of *Matthew Taylor*, deceased, and the defendant's mother was a daughter of a brother of the plaintiff and an heir at law of the old man, *Matthew Taylor*, under whom plaintiff says he first took possession. A plan was produced and received in evidence, but unconnected as it is with any grant in proceedings in partition, it cannot of itself be evidence of title in the grandfather of the plaintiff, and I do not see that it could be held to have that effect, considering the relationship of both the contending parties to him.

On the part of the defendant, the evidence of possession in himself, or at any rate of a concurrent possession with the plaintiff, is so strong that unless the plaintiff can show an exclusive title in himself, he can, I think, have no right to maintain this action.

Independently of the testimony of the defendant himself, who proves that his father was in possession of the lot as long as he can remember, and that nobody disputed his claim, and that he hauled wood off it every year while he lived, and that he, the defendant, had done the same since, a witness testifies that he knew the lot forty-five years ago, and remembers a clearing on it made by *D. S. Archibald*, the father of the defendant, which he (witness) helped to fence thirty-five or thirty-six years ago, and that every year as regularly as winter came round he cut and hauled wood off it, no person interfering with him. Another witness who testifies both as to the clearing and the cutting by the father of the defendant, says that he never knew the *Taylors* doing anything on the lot before eighteen years ago; since then they have cut on the land, and he has seen them and defendant's father on the land together within speaking distance, cutting and taking wood off. This witness says he came to the neighbourhood twenty-two or twenty-three years ago, and the first year he lived with defendant's father, who then cut and hauled wood from the lot, and continued to do so till he died. And that there was a clearing called the *David S.* clearing when he

went to the neighbourhood, and that about eighteen years ago there was one made by *Taylor*.

The learned Judge who tried the cause told the jury that the plaintiff appeared before them with a deed and documentary title which the law, under circumstances like the present, always respected; and that the defendant's position was very different, and that in arriving at their verdict this was an element which should have its proper weight. But was this in fact the relative position of the two parties? The defendant does not, it appears to me, come before the Court in the light of a mere trespasser and the plaintiff alone clothed with title; the latter says he first entered many years before he got a deed from his uncle as an heir at law of his grandfather, and all the deed could give him was the additional interest of his uncle, who was a co-heir with him and with defendants' mother, who was dead when the deed was given, leaving her husband tenant by the curtesy. and the defendant his heir at law, both of whom claimed the land and exercised acts of ownership over it.

Both parties, therefore, went in under claim of title, and it would seem that until this action was brought each respected the right of the other to cut on the land. I am of opinion therefore that the plaintiff has not established such an exclusive possession of the lot in question as entitled him to bring an action of trespass against the defendant.

DESBARRES, J.—This was an action of trespass against defendant for breaking and entering plaintiff's close, cutting down his trees, etc., and converting to his own use the timber and wood arising therefrom. It was tried before Mr. Justice *McCully* at *Truro*, a verdict was given for plaintiff and a rule taken under the statute to set it aside, which was argued in *December* term last. The first ground of objection taken to the verdict at the argument was that there was no proof of title in plaintiff, and no proof of title in *Matthew Taylor*, through whom the plaintiff derived his title. Secondly, if there was any proof of title that defendant was tenant in common with plaintiff, and therefore the action would not lie. Whether the land in dispute is in or has passed from the Crown, is a fact of which we are not informed, no grant or

copy of grant having been offered or produced at the trial by either party. The only piece of testimony from which it may be inferred that the Crown had parted with its right to the land is a plan of partition tendered in evidence by the plaintiff under chap. 135, sec. 39 of the *Revised Statutes*, and received by consent, on which is marked the names of *Matthew Taylor* and *William Fisher*, as the persons to whom the lot of land in question, known as lot No. 10, was laid off. It appears from the report of the learned Judge that *Matthew Taylor*, the allottee and grand-father of the plaintiff, married the daughter of *William Fisher*, the joint allottee with him, by whom he had four sons, *David* the father of the plaintiff, *Archibald*, and two others, whose names are not given. *David* and *Archibald* alone survived their father, at whose death and at the death of their mother they became entitled to the whole of the lot, there being no proof that these two brothers not named left any heirs; for one-half of it in right of their father and the other half in right of their mother the heir of *William Fisher*. *David Taylor* died, leaving five children, including the plaintiff and the father of defendant's mother. After the death of *David*, the brother of *Archibald*, the latter who survived him, though only entitled at most to one-half, claimed the whole of the lot and sold and conveyed it to his nephew, the plaintiff, by deed dated the 7th of *January*, 1846. The plaintiff, it appears, asserting his right of property over the lot had, several years before the purchase of it from his uncle, entered upon, cleared and taken crops from two or three acres of it, and also from time to time as he required it, cut and carried away wood for fuel and other purposes therefrom.

In *April*, 1869, the plaintiff sold and conveyed to one *Joseph Cameron*, one-half of this lot, and he has brought the present action for trespass alleged to have been committed thereon by defendant previous to that sale. He now claims the remaining half part of the lot, and the question is whether his claim, as against the defendant who also claims a right in the lot as tenant in common with plaintiff, is of such a character as to entitle the latter to maintain the present action. The defendant claims an interest in the lot in right of his mother who was a daughter of plaintiff's brother and

married one *David S. Archibald*, (now deceased,) the father of defendant, and, as such daughter, was entitled to her father's share and interest in this wood lot. It is true the defendant's interest in this lot containing only about 100 acres, of which *David Taylor*, his mother's grandfather, only owned one-half, is small, but small and of little value, as it may be, it appears the defendant's father for many years asserted his right, and defendant since his father's death has continued to assert his right in it by exercising acts of ownership over the lot and cutting and carrying away from year to year wood therefrom in the same manner as the plaintiff did.

The learned Judge before whom this cause was tried drew the attention of the jury to the fact that the plaintiff claimed under a deed, which at least gave him a colorable title to the whole lot, and explained to them the difference between a possession taken under such a title and one like that taken by defendant, who had entered on the lot to cut and carry away wood from time to time without any paper title to base his acts upon, which he said could only therefore be regarded as acts of trespass, at all events as doubtful acts of possession. There is a great difference between an entry on land under color of title and an entry without any pretence of claim; but in this case it must be borne in mind that the entries of both parties were at first under a claim of title derived from the same ancestor, old *Matthew Taylor*, the grandfather of the plaintiff and the great grandfather of defendant's mother, in whose right the latter claimed, and having so entered and both parties having exercised the same acts of ownership over the land as tenants in common, I do not see how the present action can be maintained against defendant as a trespasser. If the possession of the plaintiff had been an exclusive possession, it would, under chapter 12, sections 5 and 7 of the Act of 1866, have been considered adverse to, and operated as a disseisin of defendant notwithstanding the existence of the tenancy in common; but I do not think the possession which the plaintiff really had was exclusive, it was, in my view, a concurrent possession with defendant, and nothing more.

I am of opinion, on consideration of the whole case, that there ought to be a new trial.

WILKINS, J., *dissentiente*.—In investigating this case I have found that an inquiry is necessitated into principles and cases which, to a certain extent, are peculiar to some of the Courts of the *American Union*, relatively to their administration of the law of real property. How far these peculiarities have been, or are to be, recognized in our Court, is a question important to be decided, and one that is raised in the case under consideration. The learned Judge who tried this cause contrasted, and favorably to the plaintiff, the position of the parties on the point of apparent acts of dominion exercised by them on the land in question. He told the jury in effect that inasmuch as all such acts done by plaintiff since the date of a deed which he held of the lot, were done by one who had that deed, (even assuming it to be a defective deed) those acts so done by him established a legal possession of the whole lot as against the defendant, who had since the time when that deed was given done similar acts on the land, and the acts which constituted the alleged trespass, without showing any paper title whatever. If the established doctrine, not merely of *Massachusetts*, but of the Supreme Court of the Union, governs the case, as an adopted authority, the jury were rightly instructed. In lessee of *Clarke v. Courtenay*, 5 Peters, 354, Mr. Justice Story thus expressed the judgment of the Court on the point adverted to: "Where a person enters into land under a deed or title his possession is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet, the true owner will be disseised to the extent of the boundaries of such deed or title." In that case, the true owner is disseised to that extent; but the Court proceeded strikingly to contrast the condition of him who enters without claim of title. Respecting him in a contention with the true owner, the Court said: "If a mere trespasser, without any claim or pretence of title, enters into land and holds the same adversely to the title of the true owner, it is an ouster or disseisin of the latter; but in such case, the possession of the trespasser is bounded by the actual occupancy and consequently the true owner is not disseised except as to the portion so occupied." From this it is evident that disseisin, as put in the former part of the rules, cannot depend

on the degree of defectiveness of the colorable deed or title. The most defective deed must necessarily be as effective to produce the legal result indicated as the least defective one. The Court spoke even of a void deed or title: "All that the rationale of the rule exacts is, that by means of the paper purporting to be a deed, the extent of the possession claimed to be taken shall be made to appear." It would be irrational to require or permit a defective or void deed to be produced for any other purpose. The doctrine as above stated by the Supreme Federal Court has been recognized in *New Brunswick* in lessee of *DesBarres v. White*, 1 Kerr, 603, in which case *Chipman*, C. J. cited *Gilman v. Kelly*, (sittings after Trinity, 1838), in which it had been ruled "that wherever a party enters on land under a deed or claim of title with specific boundaries, the possession of part should be deemed possession of the whole." The doctrine in question seemed to be recognized in this Province, in *Cunard v. Irvine*. The following authorities, drawn from the *Massachusetts Reports*, demand in this connexion, careful consideration: *Willeston v. Morse*, 10 Met., 17, and the authorities therein reviewed, especially *Slayter v. Rawson*, 6 Met., 444, and the cases noticed by the Court therein. See also *Slayter v. Jepherson*, 6 Cush., 129.

Cunard v. Irvine was decided by this Court in 1853. The plaintiff's title deduced from one *Logan*, who in the year 1811, had professed to convey, by deed in proof, the lot of wild land in question to *Robie* and *Hutchinson*, was perfect, with the exception that no seisin in *Logan* appeared, save by an inference from the fact of his having conveyed. The Court, *Haliburton*, C. J., *dubitante*, decided that no seisin was shewn. *Bliss*, J., said: "The conveyance by *Logan*, though an asertion of a right, is not necessarily, to say the least of it, evidence that he had a right to convey." To have looked to *Westminster Hall* for an authority on the point of inquiry applicable to the forest land of *America* would have been hopeless, and the Court did not then possess the facilities for reference to authorities in the *Nova Scotia* Courts which we now have. Yet from that source an authority on the very point might then have been obtained, which would perhaps have averted a decision which the Court reached with

evident reluctance. I must indulge the pleasure of referring to a remark made by C. J. *Haliburton* in *Cunard v. Irvine*, because it is characteristic of the great sagacity of his mind. He said: "I cannot bring myself to view these conveyances as mere nullities, or to look upon the conveyance by *Logan* as a fraud, concocted in 1811, to enable an ejectment to be brought in 1852;" and then he added, "I think on this side the *Atlantic* the conveyances form a *prima facie* case, which calls upon the possessor to show that *Logan* had no right to convey this lot, or that he, the defendant, had subsequently obtained a right to it himself." The views thus expressed were in accordance with a decision of the Supreme Court of *Massachusetts* (of which our Court was not then aware), in *Ward v. Fuller*, 15 Pick. 187, reviewed, explained and confirmed, *sub modo* at least, in *Willeston v. Morse*, 10 Met., 17. The rule as laid down in *Pickering* is in these words: "The rule which we intend hereby to establish is, that, in the absence of other evidence, the deed itself raises a presumption that the grantee had sufficient seisin to convey, and also operates to vest the legal seisin in the grantee. That rule in the case last referred to from *Metcalf* was recognized by the same Court with a modification to be implied, perhaps from these words of the Court, viz., "This" (the rule) "is true undoubtedly, as to ancient deeds, such as were given in evidence in that case. Whether it is true also as to recent deeds" (the deed before the Court was only four years old) "may be more doubtful." The deed in *Cunard v. Irvine* was upwards of forty years old, and that with which we have to deal in this case was upwards of twenty-five years old at the trial.

It may be well to remark, that in almost all the *Massachusetts* cases where a deed is mentioned, it is spoken of as a recorded deed. This is because by one of their statutes great efficacy is given to recording where the grantor has a good and valid title. The doctrine, however, enunciated in *Ward v. Fuller* had not, and could not, have any connection with recording. This is obvious from the consideration that the grantor had *prima facie* a good and valid title, at the time of the execution, was the inference drawn from the act of executing the deed, which was an act antecedent to the recording of it.

It becomes necessary for me to notice the decision in *Boyd v. Millet*, given in the last term, because it bears on the present subject of inquiry. As in that case I differed from the Chief Justice and one of my learned brethren, who constituted the majority that decided it, I feel it my duty to forbear reasoning upon it. I content myself with stating what the decision was. That cause had been twice tried and on the same state of facts; but a circumstance marked the second trial which essentially distinguished it from the former trial. I allude to a question submitted to the jury at the latter trial which was not submitted at the former trial. It will be noticed presently. The plaintiff in ejectment sought to recover "lot 64, letter D, in *Falmouth*." The following uncontradicted facts were in evidence:—When the whole lot was in a state of wilderness, and the defendant was not on the lot nor had any connection with it, the plaintiff's father had hauled timber from off the lot to his mill. At the time when the father was so engaged, two of his sons, brothers of the plaintiff, were seen in the act of cutting on the lot. Relatively to that act of the father the Judge put this question to the jury: "Did old *Daniel Boyd* haul timber from off lot 64, as testified to by plaintiff, in assertion of his ownership of the lot?" The jury answered "He did." On the 6th *March*, 1844,—which was subsequent to the act of hauling off, when the defendant was not living on the land nor had any connection with it, nor made any claim to it,—the father of the plaintiff (so subsequently found to have previously asserted a right to the lot by an act done on the soil) conveyed in fee to his son the plaintiff the lot in question. His deed in proof described it as "described in the plan of the township of *Falmouth*, and distinguished by letter D, containing 400 acres." At the trial the plan was proved, and it established the identity of the lot with the corresponding lot on the plan. The contents of the lot were also proved. In 1847 the plaintiff, having the deed, caused the lot to be surveyed, the bounds of it to be ascertained, and a plan of it to be made, which was exhibited at the trial by the surveyor who made it. At that time, too, the defendant had no connection with the land. The defendant described himself as a squatter and asserted no claim of title to the land. He spoke

doubtfully as to the house in which he lived being on the lot. He did not pretend to have occupied any part of the land for twenty years. He then described the nature and extent of his occupation. "I have twenty-five or thirty acres of clearing. I may have four acres, may be not as much, may be more, under the plough; the rest (*i. e.*, relatively to the twenty-five or thirty acres) cut over." This was defendant's whole case, as opposed to plaintiff's claim for possession of a lot proved to contain 400 acres.—a claim founded on his father's deed professing to give him title of the whole lot,—on his own act subsequent to the acquisition of his deed, *viz.*, surveying the lot, then in a state of wilderness. The Judge told the jury that if they answered affirmatively the particular question he put to them, to find a verdict for the plaintiff for the whole lot. They found accordingly; but the Court set the verdict aside. I may as well mention (though the doctrine to which I am about to refer has perhaps no bearing on *Taylor v. Archibald*) that it seems now the settled doctrine of the Supreme Court of *Massachusetts* that he who first enters on wilderness land, and does any act of ownership thereon, *animo clamandi*, though without any colorable paper title, is seized of the whole lot claimed by him as against him who subsequently enters on the possession of the first occupant. *Slayter v. Rawson*, 6 Met., 444, confirmed in *Willeston v. Morse*, 10 Met., 17. It may be well to consider whether (although a foreign judgment respecting real estate has no intrinsic authority with us) it may not be expedient to adopt judicially, when a case may arise, a decision of the enlightened Supreme Court of *Massachusetts*, which is not opposed to our circumstances or condition, if the decision be of such a nature and in such a matter as that one on the same subject would be not likely to be found among the precedents in *Westminster Hall*.

After these preliminary views of the law, I pass on to an examination of the case before us. The learned Judge, I think, was fully warranted to consider the plan, admitted as it was, as evidence in the cause. It does not appear to me, however, to be indispensable to the establishment of the plaintiff's case. It is dated as far back as 1780, and would purport, as reported, to be the result of a division of the town-

ship under writ of partition. It was produced, too, from that office which would be its proper place of deposit, if duly certified ;—marked on its face in lot “ No. 10,” allotted to one who is proved to have been the grandfather of the plaintiff, and to one *William Fisher*. The plaintiff relied on a deed proved, and dated the 7th *January*, 1846, by which *Archibald Taylor*, in consideration of £8, conveyed to him in fee “ all the back lands in the township of *Truro*, belonging to the estate of the late *Matthew Taylor*.” It was proved that the plaintiff was a grandson of the *Matthew Taylor* named in the plan,—that he was dead at the execution of the deed,—that the feoffor in the deed named was an uncle of the plaintiff, and at the execution of it the only one of old *Matthew*’s children then living. The jury found a sufficient evidence of the identity of “ the back lands of *Matthew Taylor* ” with lot No. 10 of the plan. The parties, and the witnesses on both sides, spoke of that lot as the same with the lot in dispute. The plaintiff was proved to have exercised acts of possession on the lot long previous to the commencement of his title, under his grandfather, while at or immediately before the execution of the deed to him he was invested with seisin of the lot by his uncle, when they were both on the land. At that time, when the external bounds of the lot were sufficiently marked to be easily discernable, the feoffor, proved to have returned to the county of *Colchester* from a distant county in which he had been living, for the purpose of looking after this land, repaired to it with the plaintiff on the day before the deed was executed. The defendant was not then living on the lot, or near it. A defined blazed line was then apparent, separating the lot from the adjoining lot. The plaintiff said : “ We found the four corners of the lot when my uncle was there,—we were on it and across it.” From this it is clear that the uncle, contemporaneously with the delivery of the deed, put the plaintiff in possession of lot No. 10 in connection with the deed. That point of identity is confirmed by the evidence of *Isaac N. Archibald*, who said, “ I know the lot in question. I have one adjoining. I know the lines. My *north* line is the *south* line of the lot ” That that lot constituted a part of the back lands of old *Matthew Taylor*, was clearly proved. The jury too, must be taken to

have found that fact. The lot was proved to be a 100 acre lot called "back land." The grandfather was seised of it fifty years before the trial, as the plaintiff swore he took possession under the grandfather at that time. The seisin thereof, therefore presumably continued in the grandfather so long as the title remained in him. The plaintiff swears that when he got his deed and took possession under it from his uncle, the uncle said he was the best owner. He may have been so in law, by title derived from his father. One of his heirs-at-law he certainly was. If defendant cannot shew a better title than that thus derived to the plaintiff, he cannot be heard to cut down the presumption arising from the deed and possession of the whole lot taken under it. The evidence of seisin of the lot in the plaintiff as also in him from whom he took the deed was sufficient to warrant the verdict, if the doctrine of the *U. S. Courts*, which I have noticed is to govern our decision, and, as the original possession of the lot was shown to be in old *Matthew Taylor*, and in him alone, so far as there is evidence of actual possession, the plan, though it was, as introduced into the case as evidence, might be eliminated from our consideration.

Let us now turn to the defendant's case, and survey the position occupied by him under the evidence. All his acts and those of his father (deceased) done on the land since 1846, when plaintiff got his deed (and they consisted of partial clearing and repeated acts of cutting trees and carrying them away) were done contentiously and adversely as regards the plaintiff, and it is a settled principle of law that in such a case of conflicting acts of possession, both parties cannot be held to have had a rightful possession, but the rightful possession must be referred to him who has the better title. See lessee of *Clarke v. Courtenay*, 5 Pet., 354.

The title to the lot, in that view of the case which the *American* authorities support, is in the plaintiff, by virtue of his deed—a deed supported by sufficient evidence of seisin—a deed the validity of which I do not consider it competent to this defendant to question. The plaintiff then has the possession, unless the defendant has shewn a possession which in law is consistent with the plaintiff's proved title and possession. It was contended at the argument that he was a

tenant in common of the lot with the plaintiff. Lineally decended, through his deceased mother from old *Matthew Taylor*, the grandfather, he certainly is. The case presents no valid proof of the death of old *Mrs. Taylor*, who was a daughter of old *Fisher*. The defendant's father died ten years before the trial. He certainly, in view of the plaintiff's status, did not die seised of the lot. At the time of the execution of the deed to the plaintiff, defendant's mother was dead, and his father, in respect of any interest he had in the lot through her, was then tenant by the curtesy, and her children had succeeded to her rights. All these (defendant's father included) were, under the circumstances of this case, by operation of the deed and entry of the plaintiff under it, in his own right disseised of their respective rights by curtesy and by descent, if they existed. (*Lessee Clarke v. Courtenay, supra.*)

But, if in 1846, the children of the defendant's mother, then deceased, were tenants in common with the plaintiff in regard to the lot, still if he was then seised, as I have supposed him to have been, by virtue of the deed, his possession subsequently from the effect of the 7th section of the *Limitation Act of 1866*, read in connection with sections 2 and 12, cannot be deemed to have been the possession of this defendant, since the death of his father. That statute has completely abrogated the old doctrine of the possession of one tenant in common being necessarily the possession of his co-tenants. The possession of the plaintiff since he obtained his deed, has not been in law the possession of any tenant in common with him, if such tenancy in common existed in relation to the land in question. About three years after the *English* act passed *Culley v. Doe & dem. Taylerson*, as reported in 11 Ad. & Ell., 1008, was decided. In that case it was held that under the sections in question, the defendant's possession in ejectment could not be held to have been that of the other tenants in common, for that section (12) made the possession of tenants in common separate from the commencement of the tenancy in common and not merely from the time of the act passing. To the same effect is *Doe & d. Holt v. Horrocks*, 1 C. & K., 566. It follows that this plaintiff has been exclusively seised since the date of his deed and that defendant trespassed on his possession.

There is a view of this case which may be succinctly put thus: The first possession of the lot is proved to have been had by *Taylor*, the grandfather. Presumably, then, he owned the lot. He died, and presumably intestate. (See *Morris v. Callanan*, 105 Mass., 132, *per Gray, J.*) *Archibald Taylor*, his son, was an heir at law; he conveyed the land to the plaintiff. The plaintiff, in any view of the question, took by the deed all *Archibald's* interest. Even viewing that interest to have been merely the interest of one tenant in common, plaintiff, under that deed, must be deemed to have had possession of the whole lot. Then came the *Limitation Act*, which made his possession, then, and at the time of the trespass, exclusive of all other tenants in common. It must be borne in mind, that when the plaintiff got his deed, defendant (the son of a great grand-daughter of old *Matthew*) does not appear to have been an heir at law of the first *Matthew Taylor*.

I think the rule to set aside the verdict for the plaintiff should be discharged.

COXETTER v. HORNSBY ET AL.

Verdict set aside as being against the weight of evidence and the Judge's charge.

DESBARRES, J., now, (August 12th, 1873,) delivered judgment as follows:

This was an action brought by the plaintiff to recover the sum of \$1055.67, claimed to be due to him by the defendants for services alleged to have been performed for them in taking care of and protecting a mining property of which they were owners, situate at *Oldham*, in this County. The case was brought on by brother *Wilkins* at the last sittings of the term. A verdict was found in favor of the plaintiff. There was a rule taken under the statute to set aside the verdict, which was argued before the Court during the term, and, having since the argument considered the matter, I now proceed to state the view I have taken of it. I believe the rest of the Court concur.

It appears from the evidence that the gold mining property, out of which this suit has arisen, at first belonged to *William Fraser* (one of the defendants) and one *M. H. Richey*; that the right which *Richey* had in it after passing through several hands at length became vested in *John W. Watt*, who, on the 28th *February*, 1870, sold and transferred it to *Hornsby*, who from that time became joint-owner of the mine with *Fraser*. For several months before the sale and transfer made by *Watt* to *Hornsby*, the plaintiff was entrusted by *Fraser* and *Watt*, the then owners, with the working and management of the mine, but when *Hornsby* became the purchaser of *Watts'* interest in it and he and *Fraser* became the owners, it was at once resolved to discontinue the working and close the mine, and the plaintiff's charge as manager and superintendent of it then ceased. The plaintiff, it appears, was fully paid for all the services performed by him in connection with the mine up to the time it was closed, and the question now for our consideration is whether there is sufficient evidence to sustain the verdict which the jury have found in his favor, for services rendered by him for defendants subsequent to the closing of the mine, when *Hornsby* became joint-owner of it with the other defendant. The plaintiff produced witnesses to prove that where mining operations are discontinued it is usual to leave some person in charge of the property, but the necessity and expediency of doing so is a matter that must always be judged of by the owners, who may not consider it necessary to incur the expense of such protection, as it would seem was the view taken by the defendants in the present case.

It does not appear from plaintiff's own evidence, upon which his claim mainly rests, that any express agreement was made between himself and defendants to perform the services for which the present action is brought, or that he was requested by the defendants or either of them to protect their mining property, or that the remuneration for such services, if any were to be performed, was ever named; nor does it appear from his own showing that anything was said or done by these defendants to lead the plaintiffs to suppose that they expected him to take care of and protect this property for them. I have extracted from the Judge's minutes all the

material parts of the plaintiff's testimony bearing on this point, which is to the following effect. He says: "In *Feb.*, 1870, I stopped the mine and it was shut down. After the mine was shut down *Hornsby* desired me to enquire what an engine and pipe would cost to keep the water down. I did so, of *Symonds*, and told him (*Hornsby*) what *Symonds* said. Some time after he (*Symonds*) gave the figures, which I sent to *Hornsby*. I was in charge of the mine after it was shut down. I was solely employed for defendants. They told me when the mine was shut down to try to sell. I said to *Hornsby* 'I must be paid for keeping the mine in order.' He replied: 'All right, go ahead, and when sold you shall be paid.' There were three shaft houses and four shafts when I took charge. A week after that time the place was full of water. The tools, except those that were under water, were worth about \$40. I was to be paid by *Watt* and *Fraser* for work before shutting down. He says: '*Hornsby* said he was not going to spend any more on the mine. At the time when he purchased he told me to telegraph to shut down.' He says: 'I never rendered any account to the defendants before action brought. In the same month of the shutting down I made up my mind to make this charge, viz., \$52 per month.'" Now this is the only material evidence given by the plaintiff upon which it is contended that the verdict ought to be sustained. It is to my mind exceedingly vague and unsatisfactory, and, taking it with the fact proved at the trial that the plaintiff before this action was brought took the benefit of the Insolvent act without inserting this claim in his schedule as a debt due to him at the time, it is, to say the least of it, a claim open to grave objection. I do not mean to say that the plaintiff's omission to insert this claim in his schedule can operate as a bar to the present action, for the case of *Thomas v. White*, 1 Tyrw. & Granger, 110, is an authority to shew that the plaintiff may, notwithstanding, maintain his action. All that I desire to say is that this is a fact calculated to make an unfavorable impression on the mind as to the plaintiff's credibility. But the evidence of the plaintiff, unsatisfactory as it is on the face of it, is rendered still more unsatisfactory and unreliable by the contradictory testimony produced on the part of the defence. First of all

there is the evidence of *Fraser*, one of the defendants, called on the part of the plaintiff to prove his letter to plaintiff of 29th *June*, 1871, who, on his cross-examination, says: "I did not employ the plaintiff for the services for which he claims. He never rendered me a bill nor asked for money of me, but did ask for employment after the mine was shut down. I referred him to *Hornsby* for employment. He was discharged from our employment by *Hornsby* in my presence. He often asked me for employment on this mine after the shutting down. The letter (meaning the letter of 29th *June*) referred to plaintiff as fitted to give information about the mine, from his having been before employed by us." On being re-examined on the part of plaintiff, he said: "I did not suppose plaintiff was taking charge of the property. It was for sale from the time of the shutting down."

Hornsby, the other defendant and first witness on the defence, says: "On the day the mine was closed I purchased *Watts'* interest. Within twenty minutes afterwards, I gave orders to close the mine. I said let the mine fill, etc. I will never expend another dollar on it. I said this to the plaintiff and told him the mine was closed. I never employed him to take charge of the mine, and did not know he had the care of it. I deny what he said, 'Its all right, etc.' He asked me to give him employment, and said he did not look to me for any thing. \$370 were paid for the buildings." In his cross-examination he says: "I told the plaintiff to stop the work and that the mine should never cost me another dollar."

John W. Watt, a disinterested witness, says: "I was part owner in *February*, 1870; afterwards sold to *Hornsby*; the bargain was closed in his office. The plaintiff and others named were present. *Hornsby* told the plaintiff he had purchased my share and a telegram was written and sent off to stop all work. *Hornsby* said to plaintiff he would never spend another cent on the mine, and that nothing more was to be done. *Hornsby* agreed with me to bear all expenses to be incurred from that time till the mine was really shut up. The plaintiff came in afterwards with a small claim. The mine was therefore closed entirely."

Charles Clements, who was also present in *Hornsby's* office, corroborates *Watts'* testimony as to the closing of the

mine, and adds that *Hornsby* said "that's the last cent I will ever spend on the mine."

Wm. E. Shaffer estimated the value of the buildings at \$300 when the mine stopped. He said he would not give \$50 per month for looking after such a property as that; the buildings alone required care. He would have taken a few dollars a month to look after the property.

Richard P. Armstrong, examined before a commissioner, said: "I owned part of the mine, with *Fraser*, in 1869. We owned it jointly. I sold in *November*, 1869, to *John W. Watt*. The plaintiff was employed by us as manager. *Hornsby*, one of the defendants, bought *Watts'* interest in the month of *March*, 1870, and he and *Fraser* became sole owners. Was present at the sale to *Hornsby*, after the transfer to *Hornsby*. Was present at a conversation between *Hornsby* and *Coxetter* and others, in *Hornsby's* office, about the mine. *Hornsby* said to plaintiff that he had bought the mine and did not intend to strike another lick on it; that he did not intend to spend another cent on the mine, telling plaintiff to telegraph to *Oldham* to stop the mine, and using the words 'let her fill, etc.'"

Seeing that the evidence given by both of the defendants negatives in the most unqualified manner the fact that the plaintiff was ever employed by them, or either of them, to perform the services for which the present action was brought, and that the other witnesses called in their behalf strengthen and support by their evidence the statements the defendants have made in that and other respects affecting the validity of the plaintiff's claim, I am of opinion, on consideration of the whole case, that the verdict cannot be sustained, and that it must be set aside and a new trial granted on the grounds of its being against the weight of evidence and the charge of learned Judge who tried it.

The rule must therefore be made absolute with costs.

FAULKNER v. GUNN.

Rule to set aside verdict for plaintiff dismissed, the defendant having failed on all his grounds.

DESBARRES, J., now, (August 12th, 1873,) delivered judgment as follows :

This was an action of trespass with a count in trover brought against the defendant for taking, carrying away, and converting to his own use two small lots of timber, one consisting of 11 tons and 24 feet, and the other of 7 tons, in which both parties claim the ownership. The plaintiff claims the first or larger lot by purchase from and sale made to him by one *George Topping*, and the smaller lot by a purchase from *Wm. Holmes*. The defendant claims both lots under *Topping* alone.

In submitting the case to the jury, the learned Judge who tried it told them that the question involved in it was simply a question of right of property, and that it was their province to decide upon the evidence before them to whom the timber in dispute belonged. The jury, under the instructions given to them, found a verdict for the plaintiff, and it is now for us to say, after having heard the argument of counsel on both sides upon the rule taken to set the verdict aside, whether it is a verdict that can or ought to be maintained. My impression at the argument was that the weight of evidence which was conflicting, was with the plaintiff, and, having since then carefully read and considered the evidence, I am still of that opinion.

The grounds upon which it was sought to set the verdict aside are, 1st, misdirection ; 2nd, the improper rejection of evidence ; 3rd, that it was against law and evidence.

There is, I think, nothing in the first objection, the learned Judge having, in my view, fully and properly instructed the jury, and left it open to them to find for either plaintiff or defendant as they might think right after weighing and considering the whole of the evidence. Nor is there anything in the second objection, there being nothing in the report to shew that any evidence other than that of *Angus Sutherland* was objected to, which though at first rightfully rejected, was sub-

sequently received when the ground of objection was removed. The third and last is therefore the only ground on which, if at all, the verdict can be assailed, and to that my attention has been more particularly directed.

There being conflicting testimony in this case, the question is in whose favor there is a preponderance. Having already intimated the opinion I entertain on this point, I will refer to the evidence on which my mind has been brought to the conclusion at which I have arrived.

It was conceded by the learned counsel for the defendant at the argument that, as regarded the finding of the jury in favor of the plaintiff for the value of the smaller lot of seven tons of timber, the verdict could not be assailed, and, therefore, the objection to it is now narrowed down to the larger lot of 11 tons 24 feet. In reference to this there is first of all the evidence of the plaintiff, who says: "On 27th *December* *Topping* came to my place and sold me 11 tons and 24 feet of timber, which was the conclusion of the previous negotiation. I paid him that day part of the price, next day he took up a surveyor and surveyed it and marked F on it. He returned me the survey: it was given to me by *Roome*, the surveyor. I paid *Topping* the balance of the purchase money of this lot after I got the survey. I saw the timber about a week afterwards and a dozen times before it was removed from *Union* station and taken away by cars. I had it cut up and put in order for shipping about a month after it was purchased: it lay there at the station till 25th *May*, 1871, as cut up by me." He also says: "It was marked with a surveyor's marking iron F. and kul mark also F. I saw this on some of it up to a day or two before it was taken away. I saw it at *Truro* on 26th *May*, 1871, on the cars at *Truro* station. then saw a paint mark G. on it."

George Topping, the hewer and original owner of the timber, in his evidence, says: "About *December*, 1870, I went to see the plaintiff about the sale of the timber. I had previously arranged with him for the sale of it. This was before the timber was made. As I made the timber, I hauled and put plaintiff's name on it—(W. F.) I did it as I hewed it, piece by piece. All was marked when made: some I marked with axes and some with red kul." He also says: "Plaintiff

paid me for the first lot in full. The surveyor went up with me next morning, 28th. Plaintiff gave me an order for surveyor *Roome* to go up. *Faulkner* paid him on my account. He (*Roome*) surveyed it next day to *Faulkner*, and the surveyor put his brand on with plaintiff's name and his as surveyor." He also says: "I did not mark *Gunn's*, that is, what I made for *Gunn*." In his cross-examination he says: "Defendant's timber was made a month before I sold plaintiff's. His (plaintiff's) was not then made. I never agreed to sell to defendant the timber I sold plaintiff. I was my own master. It was my own timber, although I put plaintiff's name on it."

William Holmes was also called as a witness for plaintiff. He says: "I was present when the timber was taken away, there were no marks on it but plaintiff's."

George Roome, the surveyor, says: "I measured timber for plaintiff—two lots." Being shown a survey bill dated 28th *December*, 1880, he said: "This is the first lot—paper marked 11 tons 24 feet; second lot, measured 28th *February*, 11 tons 24 feet. Am a sworn surveyor. F. on it for plaintiff,—that alone to mean first lot. *Topping* was there and delivered it for plaintiff. Second lot *Mr. Gunn's* name. He and *Sutherland* said it was for *Gunn*. *Topping* was not there nor *Holmes*. I put G. for *Gunn* at his direction. I went with defendant and *Sutherland* 1st *March* to *Topping's* house. *Topping* asked defendant who he surveyed that timber, for yesterday. Defendant said he thought it was for him. *Topping* said no, it was the boys' and intended for plaintiff. After this I marked F on it." This, I presume, referred to the 7 tons which it is now known was the property of the plaintiff.

Opposed to this evidence, which it is evident by their finding the jury must have believed to be true, is the evidence of the defendant, and of *Angus Sutherland*, who hauled the timber out of the woods to the railroad, from which it was taken away by defendant. It is unnecessary to refer to the testimony of these witnesses further than to say that it does not controvert the important fact proved on the part of the plaintiff that the timber in question was surveyed and marked for plaintiff and in his name by the authority of

Topping, who swears it was expressly made for him ; nor does it negative the additional fact that after it was hauled out to the road it was there cut up and put in order by plaintiff, for shipping, and claimed by him as his property up to the time it was taken away by defendant.

Looking at the evidence on both sides, I think the jury were warranted in arriving at the conclusion that the property had passed from *Topping* to the plaintiff, and that any subsequent directions by *Topping*, if any such were given to haul the timber for defendant, could not affect or deprive the plaintiff of the right personally vested in and acquired by him through *Topping*. I am therefore of opinion that the rule for setting aside the verdict must be discharged with costs.

IN RE NASH BRICK AND POTTERY MANUFACTURING COMPANY.

The directors of a company incorporated under Acts of 1862, chapter 2, (*Revised Statutes*, 3rd Series, 750,) entitled "An Act for the incorporation and winding up of joint stock companies," have power to mortgage the property of the company, to discharge obligations for which the shareholders are liable, and would continue liable in their own persons if there were no mortgage. The power to borrow money implies the power to mortgage. In making calls upon contributaries summonses will be granted by a Judge to the several parties requiring the amounts for which they are liable to be paid within a specified time, without costs, unless resisted.

SIR WM. YOUNG, now, (August 12th, 1873,) delivered judgment as follows :

This company was formed in 1866, under the *Provincial Act of 1862*, chap. 2, reprinted in the third series of the *Revised Statutes*, fol. 750. It began with a paid up capital of \$10,000, which was totally inadequate to its operations, and speedily got into difficulties. After various efforts to relieve itself, the directors succeeded in raising \$6,000 on mortgage, which sum having been expended, the whole affair collapsed. The mortgage having been foreclosed, the property was bought in, for want of another purchaser, by the mortgagee for about half his demand, and he is now a creditor for the other half, and is the moving party in the present application. Under the 9th clause of the Act of 1862 he seeks to wind up

the affairs of the company, and to come with the other creditors upon the shareholders; and a full inquiry was had into the debts and credits before *Mr. James*, as one of the masters of the Court, in *August*, 1871. Our knowledge of the company and its affairs is derived from his report and the evidence he has returned, from the papers and books produced at this argument, and incidentally from two trials and two arguments had before myself and some of the other Judges in the case of *Sawyer v. Gray*. A motion to confirm the report was argued before me, at Chambers, in *March*, 1872; but on account of the novelty and the importance of the questions involved, I thought it better to remit the case to the Court *in banc*, with a memorandum, now on file, of the points that had been raised.

The rule *nisi* was accordingly argued in the present term before Judges DESBARRÉS, RITCHIE, and myself, by *Mr. Bullock* for the mortgagee and by *Mr. J. W. Johnston*, *Mr. M. H. Richey*, and *Mr. Meagher*, representing three of the shareholders, having, or charged with having, twelve shares, the holders of the remaining eighty-eight shares offering no opposition.

The main question before us was the authority of the directors to borrow on mortgage, which was warmly contested. The subsidiary questions turned on the liability of *Conrad Sawyer*, the Estate of *Robert B. Sinclair*, and *Jas. Collins*, the resisting shareholders.

This is the first time that such a liability has been urged against shareholders in corporate companies in this Court, and, considering the large number of these companies and the disastrous failure in which the transactions of too many of them have ended, it is obvious that the precedent we are about to establish is of very extensive application. By the 132nd section of chapter 87 of the *Revised Statutes*, (3rd Series,) containing the general provisions respecting corporations, no member of any corporation shall be relieved from individual liability for its debts or obligations. In the charters which the Legislature have frequently granted, no uniform policy has been observed. The members are sometimes relieved of all individual liability, but generally what is known as the double liability clause is introduced. The

Act of 1862 was framed with the view of allowing any five or more persons to incorporate themselves under the provisions and checks enumerated in the act; by the sixth section "every shareholder shall be liable in his person and separate estate during membership to an amount equal to double the stock held by him, deducting therefrom the amount actually paid to the company on such stock, &c." This Act of 1862 has been rarely acted upon, and I doubt the wisdom of leaving it upon the Statute Book. It was passed on the 31st of *August*, 1869, and I have looked at the previous Imperial acts from the 4th and 5th *Will. IV.*, ch. 94, and especially the 7th and 8th *Vict.*, chapters 110 and 111, and the 19th and 20th *Vict.*, chapter 47, but have not found in any of them the model on which our act was framed. They were all superseded or repealed by the 25th and 26th *Vict.*, ch. 89, passed on the 7th *August*, 1862, a few months after our act had passed. This consolidating act of upwards of 200 clauses, with a bulky appendix of forms, rules, and schedules, and a whole body of decisions before and after its passage, sheds a very imperfect light upon our little statute, and leaves it in fact to be in great measure its own interpreter. Most of the cases cited at the argument are founded upon deeds of settlement or proceed on principles familiar to the *English* Courts, but with little bearing upon ours. Of the preceding statute Mr. Baron *Wilde* said: "It seems to me that the act of parliament is framed on principles on which the Legislature now constantly acts, that of making every one take care of himself and giving the freest possible latitude to the forming of companies." "It is scarcely possible," says Mr. *Woodworth*, in his *Treatise of 1865*, illustrating the Act of 1862, "to over-estimate the importance of joint-stock companies. Millions of capital are embarked in, and hundreds of thousands of persons connected with them." He eulogizes the principle of limited liability established in 1855 and 1856; but carried to the length it is in *England*, I would deprecate its introduction into this Province. According to *Wordsworth*, fol. 58, with a company formed upon the memorandum and Articles of Association in the Act of 1862, the creditors sole resource is against the company's funds. It is only when the company is being wound up, that the members are liable for any thing,

and that is a contribution to the assets called for by the liquidator, for the purpose, by winding up, of liquidating the company's debts. But the members are not liable even in that way, where the company is a limited one and they have fully paid up their shares,—25 and 26 Vic., ch. 89, sections 18, 38, Appendix 67-72. In such a case, a member is forever free from all anxiety and liability.

It will be perceived, then, that the fundamental rules of the Imperial act, and the provisions of course of the numerous deeds of settlement restraining or defining the powers of directors, form the material and ground work of the *English* decisions, and they are wholly wanting with us.

I shall glance at a few of the cases cited at the argument which bring out the distinction. In *Burmester v. Norris*, 6 Exch., 796, the *German Mining Company* was established by deed of settlement, and the question was, whether it gave the directors power to borrow for the necessary affairs of the company. The money was borrowed with the knowledge of the shareholders and was necessary for carrying the undertaking on. But the Court held that the directors were constrained by the words of the deed, and that the plaintiff could not recover unless the consent of all the subscribers could be proved. Yet in *Ex parte Chippendale*, in the same company, 4 De G. McN. & G., 19, the Court of Chancery held that the directors being trustees were in that character entitled to indemnity from their *cestuis que trust* against expenses *bona fide* incurred.

In the *Worcester Com. Exchange Company*, 3 De G. McN. & G., 180, by deed of settlement the directors had power to borrow money under certain conditions, but it was held they could not call upon the shareholders for money advanced out of their private funds, or borrowed, but not in conformity with the provisions in the deed. See also *The British Bank v. Turquand*, 6 El. & Bl., 327, cited in the Privy Counsel, 13 L. T. R., N. S., 105. *The East Anglian R. R. Company v. Eastern Counties R. R.*, 11 C. B., 775, where the defendants were controlled by an act of Parliament, and having a limited authority could apply their funds only for the purposes directed and provided for by the statute.

But is there any such restraint in our act of 1862. It extends to every object of corporation except only that by the first section, no company shall be incorporated under it for banking, insurance, or ordinary mercantile and commercial business, and by the 20th section, no gas or water companies shall be incorporated under this act within the city of *Halifax*. It would comprehend companies for ship-building, and for every variety of manufacture, for which buildings must be erected and debts incurred. The provisions of chap. 87 are incorporated with it, contemplating the holding of real estate, which may be sold under execution in the same manner as personal estate, and it is obvious that all the usual rights or powers of corporations must extend to such bodies under our Act of 1862, else the object of it would be defeated and the act of no avail. The debts therefore reported by the master as incurred by this company, and for all that appears, incurred in good faith in the prosecution of its business, are debts of the company, to which, when its proper funds are exhausted, the double liability clause applies. The book of minutes produced at the argument commences *May 29th*, 1868, and ends *July 16th*, 1869. It consists of brief notices signed by *W. Myers Gray*, the Secretary, from which I extract all the passages as to loans. At a meeting of directors *25th January*, 1867, the President was authorized to borrow \$1500 upon the best terms possible, not to exceed a commission of 5 per cent. for three months. At another meeting of directors *17th June*, 1867, if no sale of bricks could be made, the President and Secretary were empowered to raise money upon the property and works to pay off debts and wages. At a meeting of the shareholders, *June 26th*, 1867, after stating the liabilities of the company, it was resolved that the money required to pay the amount, say \$4000, be raised by the joint and several notes of the shareholders; and if the amount cannot be raised in that way, that the directors be authorized to mortgage the property and works of the company to procure the money. On the *25th June*, 1868, the Secretary stated to a meeting of directors that Messrs. *W. M. & S. H. Gray* were prepared to advance the company, upon a loan for twelve months, \$6000 at 6 per cent. interest, and that their charge for negotiating the same was 5 per cent. commission, exclusive of any papers

and charges, and it was resolved that the Secretary be authorized to accept the loan upon these terms, and to give a bond and mortgage of the property and works as security.

These entries shew that the mortgage was deliberately given to discharge obligations for which the shareholders were liable, and would have continued to be liable in their own persons had there been no mortgage. The directors could have borrowed money to pay these debts, which implies the power to mortgage the property of the corporation, real and personal, to secure the payment, a power which can be restrained only by express prohibition in the act; see the cases in *Abbott on Corporations*, 475. In the case of *The Bank of Australia v. Breillot*, 6 Moo., P. C., 152, under a power in the deed of settlement to conduct the affairs and business of the company to the best of their discretion and judgment, it was held that the directors might borrow money for the purpose of discharging the existing liabilities of the bank, till the assets should be realized. And in the *Southampton Boat Company v. Pinnock*, 9 L. T. R., N. S., 748, the Master of the Rolls assumed the power of the directors to mortgage the property of the company, upon a resolution properly passed for that purpose.

Let us now ascertain the amount of liabilities. Including the balance due to *R. S. Sterns*, the mortgagee, after crediting his purchase and various sums due to or advanced by shareholders, the whole liabilities are stated in the report at..... \$8504 38

From which two sums for *Silver's* estate and

Forman's are to come off..... 1032 61

Leaving \$7451 77

To which the costs, including the Master's charge,

must be added, say 148 23

\$7600 00

No interest to be allowed under all the circumstances of the case.

The balance due by parties liable as shareholders who have offered no opposition, appears by the report to be \$2888.00.

I have now to deal with the shares appearing in the report under the names of *Conrad Sawyer* and the late *Robert B. Sinclair*. As regards the former, independently of the affidavits used at the argument, the facts have become known to the Court who have pronounced their judgment in the suit vs. *Gray*, and no legal transfer having been made to said *Sawyer*, he is discharged from liability which will attach in respect of his five shares to *W. M. Gray*. As regards the late *Robert B. Sinclair's* five shares, so far as the facts appear, his estate must be held liable. But if any new facts can be disclosed justifying further inquiry, the Court will direct a reference at the instance of his representatives, subject to the payment of costs in the discretion of the Court.

The amount to be collected from shareholders will then be \$2638.

The mode of making calls and collecting money from contributaries is settled in *England* partly by the act which does not extend here, partly by usage, as appears from *Wordsworth's Treatise*, 236, &c. Here we must establish a practice for ourselves. The solicitor of the mortgagee is the principal party interested, and a Judge will grant him summonses for the several parties for the above net amounts, requiring that they should be paid within a specified time to the Accountant General, without costs, unless resisted. If resisted, the mode of enforcing payment will be hereafter determined. When the amounts are ascertained and collected a final order will pass for their distribution, and the provisions of section 19 of the Provincial Act of 1862, which have been so far observed, will be carried out, and justice done to the mortgagee and other creditors.

MANNING v. DEWOLF.

DEFENDANT having seduced plaintiff's sister, was induced to marry her by the solicitations of her father, who professed his willingness in such case to support her. Immediately after the marriage defendant left his wife who, without notice to her husband, went to live with her brother, the plaintiff, with the intention of charging her husband with her support.

Held, that plaintiff could not recover.

YOUNG, C. J., now, (August 12th, 1873,) delivered judgment as follows :—

.Verdict for plaintiff for \$70 against the impressions, if not the opinion of the Judge. Action by brother of wife against the husband, who had seduced her but married her before the child was born, at the urgent solicitations of the father. John Manning. His evidence was: "I am father of Mrs. DeWolf, she lived with my son after the marriage. She went shortly after; about a month; he had more means and convenience to take charge of her; he lived up stairs; had two rooms and the use of the kitchen; my son provided for his wife, Mrs. DeWolf and himself; I lived below in the same house; meals were taken separately—(cross-examined)—we once in a while eat together; I made defendant all kinds of promises, to induce him to marry my daughter; he disputed about marrying her, and I said there was the house and she could live in it; I might have said he might go where he pleased; she remained in the house and he went away; there was a child to be born and it ought to have a father; I might have said a good deal; I was excited; I am willing to keep my daughter, and I mean to keep her; I am keeping her now and was from the time of her marriage; she can have half of my loaf any time—(cross-examined—I made the promise before the marriage."

The plaintiff said that he and his family lived with the father, but they separated and kept separate tables a month or two (the wife said a week or so) after the marriage. Plaintiff never asked defendant to pay him. The wife said that plaintiff intended to get pay when she went to board with him; they talked it over; they did not contemplate the action at first; defendant left her next morning after the marriage, in *September*, 1870; the wife had never seen him to speak to him since.

The case turns entirely upon these special facts. The rule of law is clear as laid down in *Selw. N. P.*, 12th edit., 333; *Fisher's Digest*, 4407-9; the husband here having deserted his wife without cause, would be clearly liable for necessaries suitable to her station to any stranger who supplied them, without promise on his part, and even, as I think, in the face of his remonstrance; 4 *Esp.*, 41; 3 *H. & N.*, 261; 13 *L. T. R.*, 369.

I would go a step further myself and hold the deserting husband liable to the father and brother of the wife, although the case of *Bradshaw v. Beard*, 6 *L. T. R.*, 458, relied on by the plaintiff's counsel, is rather against the proposition. It would be confined at all events to necessaries supplied, for it was recently decided in *Deare v. Soutton*, *L. R.*, 9 *Eq.*, 151, that a person who has advanced money to a married woman deserted by her husband, for the purpose of, and which has been actually applied towards her support, is not entitled at common law though entitled in equity to recover such sums from the husband. The difficulty here is the evidence of the father and the obvious purpose of the family to fasten a liability on the defendant without notice. The wife might have remained with the father if she chose, her going up stairs to the brother in the father's house and the brother's supporting her and her child, did not originate in any necessity. This is very analogous to the case where the wife has adequate resources of her own, of which the plaintiff had notice, or is in fact adequately provided for, *aliunde*, in neither of which cases can the husband be made liable; 2 *Stark*, 88; 4 *Burr.*, 2177; *Moo. & Mal.*, 101; *Roscoe's N. P.*, 11th edit., 316; 3 *C. & P.*, 15; for these reasons I think that the verdict cannot be sustained.

Note.—Subsequent to the printing of the last preceeding case a number of judgments bearing date in February and following months of 1873, and which should therefore follow at p. 214 ante, were discovered and edited, and these are hereto subjoined in their order of delivery.—Editor.

WALLACE v. BREHM.

THE plaintiff sought to have a verdict for defendants set aside, on the ground that the schedule attached to a deed of composition and discharge under the Insolvent Act should not have been received in evidence. No objection could have been raised to the deed itself, the schedule was attached to the deed when produced, and no evidence was adduced to show that it was not so attached when the deed was executed.

Held, that there was no ground for disturbing the verdict.

RITCHIE, J., now, (February 4th, 1873,) delivered the judgment of the Court as follows:—

The plaintiff in this case took out a rule, under the statute, to set aside the verdict found for the defendant. The evidence on the trial was very conflicting, and was, in my opinion, properly submitted to the jury. On the argument the counsel for the plaintiff relied much on the improper reception of a schedule annexed to a deed produced on the part of the defendant, and on the misdirection of the learned Judge who tried the case. No objection was, or indeed could have been raised to the reception of the deed itself, which was a deed of composition and discharge under the Insolvent Act of 1869, by which *Thomas J. Wallace*, to whom the note in question was given, undertook to release the defendant from all further charge and demands, which he might have against the defendant from any cause whatever; the schedule was attached to the deed when produced and no evidence was adduced to shew that it was not so attached when it was executed, and *Mr. Wallace*, though examined himself, did not assert that it was not so annexed when he executed it. The learned Judge left all the conflicting testimony to the jury in the most open manner, inviting them to draw their own inferences from it; and if they gave credence to the evidence on the part of the plaintiff there was quite enough to justify their verdict.

On the question raised as to the stamping of the note alone, I do not see under the evidence of the defendant, if the

jury believed it, how the plaintiff could hope to disturb the verdict, and the appearance of the stamps, which were affixed to the note when produced, was strongly corroborative of the account given of them by the defendant. The rule for a new trial should, we think, be discharged.

WARD ET UX. v. CITY OF HALIFAX.

THE plaintiff and his wife while walking along one of the streets of Halifax, fell into an open sewer and sustained injuries, for which they brought an action against the city and were awarded damages. The City then applied for a new trial.

Held, that the City, although not provided by the Legislature with funds for that purpose, was liable for any acts of negligence on the part of their servants or employees in and about the streets.

Secondly, that the plaintiffs must clearly show that they have not been guilty of negligence themselves. And this not having been done, although the declaration contained averments that the plaintiffs had employed ordinary caution, a new trial was ordered.

SIR W. YOUNG, C. J., now, (February 4th, 1873,) delivered judgment as follows:—

This is an action for damages brought by *John Ward* and wife against the *City of Halifax*, in consequence of an injury sustained by the latter at the corner of *Hanover Street* and *Campbell Road*. There is no doubt the injury was done, and the damages awarded were not excessive. The defences at the trial were want of due notice of the action under the Charter—want of authority in the Superintendent of Streets—and want of adequate proof of *Hanover Street* being a public highway. None of these defences, we think, could prevail. The notice of action served on the Mayor was enough, and the acts of the Superintendent must be accounted the acts of the Corporation who employed and paid him. *Hanover Street*, though at the northern extremity of the city, and long disused, ran into one of the leading roads connecting it with *Shaw Street*, which runs parallel to the road and is built upon, and having been cut down and improved some years ago at the expense of the city, must be accepted as a public street which, the jury found it to be.

But two questions arose upon the argument, both of them attended with difficulty; and as they involve import-

ant principles, it is in the interest of the public and incumbent on us to look into them thoroughly, though they were not suggested at the trial. The first of these, is the liability of the City under its Charter. This has hitherto been taken for granted in this Court, though in the only reported case, that of *Evans*, in *Oldright's Reports*, III., the City was discharged. The case, however, was decided upon exceptional facts, and it was supposed to be governed by the case of *Hall v. Smith*, 2 Bing., 156, which was right in itself, but the doctrine laid down by Chief Justice *Best* has been held to have gone too far. See as to this point 14 L. T. Rep., N. S., 682; 1 H. & N., 61. The liability of the City, therefore, is now for the first time to be determined, and it is a pretty large, and a very difficult question. Is the City to be held responsible for all negligences of its committees, superintendents and labourers in and about the streets, in town and the roads on the Peninsula, and for all acts of malfeasance and non-feasance leading to accidents and injuries; and if so, from what fund are the damages and costs to be paid. In the Act of 1864, secs. 330, 331, the objects to be provided for by assessment are strictly defined, and to pay such damages and costs, the City Council must misappropriate money raised for other purposes. On the other hand, they have the general charge of the streets, acting through a committee drawn from their own body, and a superintendent appointed by themselves, and removable at pleasure. And if a citizen is injured in person or property by the negligent performance of a public work, or by the supineness or carelessness of a public officer or employee, it is more accordant with natural justice, that the loss should fall on the whole community, than on the individual, who has been injured without any fault of his own.

Several cases were cited at the argument and others have since been found in the *American* reports, founded partly on acts of legislation in the different States, which we have not adopted, and the decisions are by no means consistent with themselves. Those of *Massachusetts* are to be found in the Digest, 804, and they discountenance any liability of the Towns for such accidents at common law. See *Mower v. Leicester*, 9 Mass., 237, and *Brady v. The City of Lowell*, 3 Cushing, 124. In *New York* an opposite view appears to

prevail. In a note to the *American* edition of *1 H. & N.*, 59, the case of *Lloyd v. The Mayor of New York*, 1 Selden, 369 shows that a Municipal Corporation is responsible for the negligence of those whom it employs, in not lighting or closing an excavation made in the streets for repair of a public sewer. And in the case of *Stons v. The City of Utica*, 3 New York Appeal Reports, 104, the same principle was upheld referring to a recent case, *16 N. Y.*, 161, where it was held that a Municipal Corporation which owes to the public the duty of keeping its streets in a safe condition for travel, must compensate persons receiving special injury from the non-observance of that duty. So in *The City of Buffalo v. Holloway*, 3 Selden, 493, the opinion was clearly expressed, that the Corporation of *Buffalo* was liable to persons receiving injury by its neglect to maintain lights and guards around the excavations made in progress of the work.

If the American decisions are thus in conflict, the *English* cases on the liability of Corporate Bodies, Trustees or Commissioners carrying on public works, are infinitely more at variance, and would have required an extended review had it not been for the able and exhaustive judgment of Mr. Justice *Blackburn* in the case of *The Mersay Board v. Gibbs*, adopted by the House of Lords; L. R., 1 H. L., 93; 14 L. T. Rep., N. S., 677. He quotes with approval the rule laid down by *Bayley, J.*, in *Jones v. Bird*, 5 B. & Ald., 837, that "it is not enough that Commissioners executing a sewer authorised by statute, should act *bona fide* and to the best of their skill and judgment. They are bound also to conduct themselves in a skilful manner, to do all that any skilful person could reasonably be required to do in such a case." After citing an opinion somewhat opposite of Lord *Cottenham*, and which this case may be taken to have overruled, Judge *Blackburn* prefers the doctrine of Lord *Campbell*, in 8 Ell. & Bl., 812, that in every case the liability of a body created by a statute must be determined by a true interpretation of the statute under which it is created. And if the true interpretation of the statute is, that the duty is cast upon the incorporated body, not only to make the works authorized. but also to take proper care and use reasonable skill, that the works are such as the statute authorizes, or to take reasonable care that they

are in a fit state for the use of the public, there is nothing illogical or inconsistent in holding that those injured by their neglect should be compensated out of their funds.

The last case I shall cite upon this branch is that of *Forman et ux. v. The Mayor, &c., of Canterbury*, 24 L. T. Rep., N. S., 385, founded on the above case in the House of Lords and decided in 1871. It was brought for an injury resulting from a heap of stones left on a public highway and remaining during the night without guard or light, and it was held that the defendants were liable for the negligence of their servants in placing and leaving such a heap. The defendants were the Local Board of Health under the Local Government Act 1858, and bear a close analogy to the City Council or Committee of Streets under our Act of 1864. This case also has a bearing on the case of *Evans v. The City*, already cited from Oldright's Reports.

On the authority of these cases, and especially the two last, I am of opinion that the city, although not provided by the legislature with funds, (as to which point see 8 *El. & Bl.*, 313,) are liable for any acts of negligence in their servants and employees in and about our streets. But there are two important limitations, never to be lost sight of—first, negligence in every case in the officers and servants of the city must be shewn to the satisfaction of a jury, affirmed by the Court. A case was tried before me some years ago which illustrated this: If a street is in good order at sunset, and during the night a rush of water forms a trench, or a drain originally well executed falls in under the violence of the storm, the city is not liable for an injury done before the defect is known or can be cured.

On this head a clause in the *Massachusetts Digest*, chap. 25, sec. 22, is well worthy of imitation by the revisors of the city charter, as it gives the city twenty-four hours to cure any defect or want of repair in any highway or bridge, and if the city had reasonable notice of such defect the party injured may recover double damage. These provisions are just to both parties, and afford the city reasonable time and protection. So it cannot be expected that the used and obscure streets in the suburbs, or the roads on the Peninsula can be kept in the same exact order with *Granville* or *Hollis Street*,

side ditches may be sufficient in the one which would not be tolerated in the other. So also some respect must be paid to the way in which the streets are constructed. The breaks in the stone causeways are necessary, but very dangerous things; but it does not follow that every one who thoughtlessly or accidentally gets his foot in them and gives it a twist, has an action against the city. A plaintiff, again, who runs incautiously against a lamp-post or a tree standing on the street, or a fence or post put up, with the assent of the city officers, to guard or facilitate the erection of a building, must not expect as a matter of right to recover damages.

Every case, in short, must depend on its own circumstances, and the *onus* of proving negligence will generally rest on the plaintiff. In the present case it is to be noted that the drain in *Hanover Street* had been opened as far back as 10 or 12 years ago, that it must be presumed to have been done in a workman-like manner, that it was run originally under the *Campbell Road*, and that the tail of it extended across the sidewalk, not by any act of the city or its officers, but from the lapse of time and the water gulling it out.

And this introduces the second and equally material limitation, that the plaintiff shall be guilty of no negligence himself. The cases on this head also are numerous, both in England and America, and they concur very much with each other. In four cases against the inhabitants of *Andover*, 2 Cushing, 600, it was held that a town is liable for an injury occasioned by a defect in a highway, where the primary cause of the injury is a pure accident, as for example the failure of some part of a carriage or harness; provided the accident occur without the fault or negligence of the party injured, and be one which common prudence and sagacity could not have foreseen; and provided also that the injury could not have been sustained but for the defect in the highway. In *Sponhawk v. The City of Salem*, 1 Allen's Mass. Rep., 30, it was decided that a town is not liable for an injury sustained by a traveller while straying outside the limits of the highway where the whole highway and the land next adjoining are safe and convenient to travel upon; nor are towns obliged to maintain fences merely to prevent travellers from straying out of the highway.

It is not every negligence, however, that will deprive a plaintiff of his right to recover damages. In *Davis v. Mann*, 10 M. & W., 546, *Parke B.* lays down the rule in these terms; "that although there may have been negligence on the part of the plaintiff, yet unless by the exercise of ordinary care he might have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." The same rule was adopted by *Byles J.*, at *Nisi Prius*, 6 L. T. R., N. S., 255, in the case of *Witherley v. The Regents Canal Company*, brought under Lord Campbell's act, "that if the deceased, by his own negligence, partly contributed to the accident, so that but for that negligence it would not have occurred, the company were entitled to the verdict even although there had been some want of care on their part."

Let us apply this principle to some of the cases mentioned at the argument. It is in proof that there is an open sewer on the south side of *Hanover Street*—there is one as we all know, on the west side of *Park Street*. Now suppose a man, in place of keeping in the middle or safe side of the street, from stupidity or intoxication, tumbles into one of these sewers, the question then would be has he brought the injury upon himself, and if so the city must be acquitted. The pleader who drew the declaration in this case—and it is very well drawn—was sufficiently alive to the rule. He avers both in his first and second count, that the plaintiff, the wife, was using the public highway and employing ordinary caution in the use thereof. In answer to this the defendant's in their fifth plea say, that the sewers, &c., were covered, &c., so as to prevent damage or injury to any person using the highway and employing ordinary caution in the use thereof.

This was the main issue, or one of the main issues to be tried, yet it seems to have attracted no attention whatever, nor was the judge even asked to submit it to the jury. I am very clear that it ought to be so and must be found for the plaintiffs before the city can be held liable, and therefore that there must be a new trial; but as the defence was not made at the first trial, I think that the rule *nisi* should be made absolute without costs.

WALKER ET AL v. BAYERS.

ACTION of ejectment between adjoining proprietors, the questions being entirely matters of fact, and the jury having found for the plaintiff, although there was sufficient evidence to justify a verdict the other way if they had thought fit.

Held, that the verdict should not be disturbed.

The defendants tendered two plans in evidence which came from the Crown Land Office, which the witness who produced them stated had been there for at least thirty years, but neither their origin nor history was given, nor was it shown that they had been regarded in that office as authentic.

Held, that the Judge had done right in rejecting them.

DESBARRES, J., now, (February 4th, 1873,) delivered the judgment of the Court as follows:

This was an action of ejectment to recover the possession of two small triangular pieces of land claimed by the plaintiff as part of a tract of 450 acres, situate at the *Dutch Village*, near this city, that was granted by the Crown to the Bishop of *Nova Scotia* and others on the 1st *May* 1813. The grantees by deed dated 20th *April*, 1859, conveyed 36½ acres of this tract to *Robert Walker*, one of the plaintiffs, who, together with his wife, conveyed the same to his son *Edward*, the other plaintiff, by deed dated 10th *July*, 1868. The action it appears was at first brought in the name of *Edward Walker*, but upon an application made to a Judge of this Court, leave was granted to add the name of *Robert Walker* as co-plaintiff with *Edward*, and the action was thenceforth prosecuted in the names of both plaintiffs.

It was contended by the plaintiffs at the trial as well as at the argument, that the two lots of land in question, which are divided by a street running through them, were clearly shown by the evidence to be within the grant to the Bishop and others, and part of the tract of 36½ acres conveyed by the grantees to *Robert Walker*. The defendant, on the other hand, contended and insisted that the two small pieces of land in dispute were part of a tract of 94 acres of land immediately adjoining the *Glebe* land on the east that was granted by the Crown to Colonel *Frederick Hamilton* on the 6th *June*, 1763, to which he claimed to have a legal title, first of all under a deed from Colonel *Hamilton* to *George Bayers*, the great grandfather of defendant dated 7th *October*, 1763, which was but a short time after the passing of the grant; then under

the will of *George Bayers*, dated 3rd *May*, 1801 ; and, lastly, under a deed from *Francis Bayers* and others to defendant, dated 3rd *January*, 1851. It is not denied on the part of the defendant that the plaintiffs are entitled to 36½ acres of the *Glebe* land granted to the Bishop of *Nova Scotia* and others, nor is it denied on the part of the plaintiffs that the defendant is entitled to the land granted to Col. *Hamilton*.

The legal title of the contending parties to the lands conveyed to them by the respective deeds produced in evidence, was admitted at the argument, and, having been admitted, the question involved here is not a question of title upon which we are called upon to express an opinion, but a question of disputed boundary between the two grants, which is more a question for the consideration of the jury than for this Court. The case was tried before my brother *McCully*, under whose charge a verdict was found for the plaintiffs. A rule *nisi* was taken under the statute to set aside the verdict aside upon grounds with which we have become quite familiar : first, as being against law and evidence ; next, for the improper reception and rejection of evidence ; and, lastly, for misdirection. Looking at the evidence given in the cause and the charge delivered by the learned Judge to the jury, I do not think the verdict ought to be disturbed upon any one or other of the grounds taken in the rule. There is, it is true, no evidence of any line having been run and established between the original owners or grantees of these two adjoining tracts of land, but there is evidence of a stone wall as a boundary between the two lots or grants for a period of sixty years, by which those holding under the respective grants on either side appear to have held the lands they claimed. The lots in dispute are to the west of the line of wall, and are, according to the plaintiff's contention, within the *Glebe* tract and part of the land conveyed to *Robert Walker* under the deed of the 20th *April*, 1859. If that be true, nothing short of a possession in defendant for twenty years can give him a right to hold the disputed lots, and, as the evidence on that point does not show a possession for more than nineteen years of one lot and fourteen years of the other, no title by possession has for that reason been acquired by the defendant, and we come back to what I consider the only real and important question.

in this case, and that is the question of boundary between the two grants. The true west line of the *Hamilton* grant, which must be the east line of the *Glebe* grant according to the description in the former grant, is represented as being on a road communicating between the blockhouses, of which road no traces are to be found, and there is at this moment no known boundary between the two grants other than the stone wall which has been on the ground for sixty years. The line of this wall is a straight line. A line running between the blockhouses, if their localities are rightly laid down on the plan, would be a crooked and circuitous line, and if the stone wall is not the boundary there is at this day no boundary whatever between the two grants. Now it appears to me that the inference to be drawn from the acts of the owners and occupiers of these two adjoining grants of land is that the stone wall, whether originally built as such or not, was, by common consent, considered as the boundary of the two lots.

Robert Walker's evidence is important as regards the occupation of the *Glebe* land and the boundary by which it was held, though on one or two points it is not favorable to himself. He says: "I know the *Glebe* land and have known it for fifty years. I purchased part of the *Glebe* land and leased property of the *Glebe* land before I purchased. I was in possession of between 20 and 40 acres. I know the east bound of what I was in possession,—it was the west side of *Bayers'* stone wall; that was my boundary on the east. I have known the stone wall for sixty years. I forbade parties working on the land in dispute. I know the triangular pieces of land, one lying on the north of the village middle road and the other on the south. It is the property in dispute. I deeded these triangular pieces of land to my son. I was in possession of them over twenty years, the two corners of which I held up to the stone wall and followed it as my boundary on the north. I own the south part and my son the other. There was a stone wall as a south boundary; I held up to that. About ten years ago a part of the disputed portion was not fenced by the defendant. They began to fence on the south part about fourteen years ago." In his cross-examination he says: "*Bayers* was clearing it (the land). When I purchased he had not fenced it; it was then a wild

piece of common on the south side of the road. He had possession when I got my deed fourteen years ago. I had it in claim then. I fenced in a part of it before I got my deed,—a piece on each side of the road,—not any of the triangular lots. *Titus Smith* made a survey thirty years ago. I employed him to run off my land under that lease. He made the line to run where the defendant claims now. I went into possession under the survey." On being re-examined he says: "I employed *Smith* to lay me off twenty acres of the *Glebe*. I was not in possession then. I might have fenced ten acres; it was no part of the triangle."

Wm. A. Hendry says: "I know the property in dispute. There are about three acres, I think. I identify the property described in the *Glebe* deed in this plan." On the description being read over he says: "I am familiar with the lines and property there. According to the description read over, the triangular pieces are included in the *Glebe* deed to plaintiff. On hearing read the description from the Crown grant, I recognize the locality described in the *Glebe* deed to plaintiff *Robert Walker* to be within that contained in the Crown grant. I know the remains of an old blockhouse east of the stone wall which forms the west boundary of *Bayers'* land. I was agent for the church lands out there for several years, perhaps eight or nine years. Began to be agent in 1850. Outside of the stone wall west was always recognized as *Glebe*. I have known the stone wall for thirty years." In his cross-examination he says: "The *Glebe* land is bounded on the east and the *Hamilton* grant west by the blockhouse road."

The evidence of *John Kline*, the next and last witness for plaintiffs is not material.

Then comes the evidence for the defence. *Thomas Bayers*, defendant, says: "I have known the premises since I can remember. I live near them. My father always held possession of the two triangular lots; always claimed them. It was all an open common. I first fenced the two disputed lots. I enclosed them on plaintiff's boundaries; the one south of the road was fenced twenty years ago; the fence is where it was originally put. I have cultivated part of it and grubbed the rest; eight or nine years since I cultivated. *Walker* put up

the fence on the base or north side of the triangle. It is fourteen years since I enclosed the north-east lot. *Walker* had fenced on the line I claimed to before I fenced at all." In his cross-examination he says: "The deed of the two corner lots was another and different deed from that which I got of the other lands. My grandfather's property has been divided—the last of it about a year ago. There was no division till after I purchased these two lots."

Charles Fairbanks, surveyor, was next called, and says: "I surveyed the lots and laid out the *Hamilton* grant on the ground. I found the remains of blockhouses where I have marked them on the plan. The lots in dispute are covered by and contained in the description of the *Hamilton* grant. Description of defendants' deed describes the land in dispute, and it is in the *Hamilton* grant. I can't find a trace of the Blockhouse road."

John Bayers, sen'r, brother of defendant, was next called. He speaks of the survey made by *Titus Smith*, at which *Robert Walker* was present, twenty-seven or twenty-eight years ago and says: "We ran on a sight from the blockhouse and laid stones on the base line. This was the full line run. *Walker* put up a fence on the north side of the road and defendant put up the remainder. *Walker* went into possession under a lease he got of the property. The fences have been there ever since they were put up."

Alfred Bayers, son of defendant, was next examined. He says: "I know the lots in dispute. My father has had them fenced a long time. I remember my father put up the line fence twenty or twenty-one years ago last spring. *Walker* knew it and made no objection. This divided defendants' lot from plaintiff's. The fence along the road had been made before *Walker* put up the fence from the stone wall to the road."

Wm. A. Hendry, recalled, and on being shewn a deed with a plan annexed, says: "I made the plan from an actual survey for *Thomas Bayers* in 1850. I made a division of the estate and plans for different members of the family. The piece of land in dispute was not taken into account nor divided. I told him the *Glebe* folks obtained it."

Thomas Bayers, the son of defendant, was the last witness, but his evidence not being material need not be repeated.

Now the most material evidence in this case is that given by *Mr. Hendry* on one side and *Mr. Fairbanks* on the other. *Mr. Hendry* proves the lots in dispute to be within the grant to the Bishop of *Nova Scotia* and others, called the *Glebe* lot, and *Mr. Fairbanks* states that these lots are within the *Hamilton* grant. They entirely differ with each other on that point, but their evidence, as well as their credibility, like that of all the other witnesses, was for the jury and not for us, and having decided in favor of the plaintiff, it is not for us to exercise the functions properly belonging to the jury, and say their decision was wrong. The case was, as I think, fairly and properly left to the jury by the learned Judge, who told them that he thought the plaintiff or defendant should succeed just as it was made to appear that the premises in dispute were contained in the *Hamilton* or *Glebe* grant, expressing his view that the existence of the stone wall for sixty years was a significant fact to shew where the boundary between the two grants was. I do not see any ground to complain of the charge of the learned Judge, and may add that I do not know in what other way the case, under the circumstances, could well have been presented to the jury. There is therefore, in my view, no ground for setting aside the verdict for misdirection.

But it was contended that the two old plans spoken of by *Mr. Hendry* as coming out of the Crown Land office and tendered as evidence on the part of the defence, ought to have been received, and that, having been rejected, the verdict on that ground alone, if for no other, must be set aside. *Mr. Hendry* says he found these plans in the Crown Land office thirty years ago and pasted and put them in book shape. No. 8 he considered a very old plan,—it was partly gone; the other, called the *Fleign* plan, purported to be a copy made by *Fleign*, Deputy Surveyor. He knew of no original of it. If the origin or history of these plans had been given, or if it could have been shown that they had been received and regarded in the office as authentic, or accepted and recognized by the owners of the lands described as true and correct delineations of their properties, then I think they ought to

have been received ; but no proof was given of their authenticity or that they were recognized as true and reliable plans, and they were tendered as evidence simply because they were found in the Crown Land office by *Mr. Hendry* thirty years ago and pasted and kept there in book shape ever since. *Mr. Hendry* does not even say that he considered either the one or the other of these plans such as were to be relied upon, from their character and age, from his own personal knowledge of their correctness, or any other circumstance that would give them validity. It would, I think, be going too far and unwise to hold that plans coming out of the Crown Land office, under such circumstances, were receivable in this Court as evidence binding on litigant owners of land. In my view, therefore, the learned Judge exercised a sound discretion in rejecting them.

On the ground taken of the improper reception of evidence nothing more need be said than that there was no objection made at the trial to any of the evidence received.

Looking at this case as one peculiarly for the jury, and one in which upon the evidence, the jury, if they had thought fit, might have found a verdict the other way, yet having found it for the plaintiff upon evidence which, being believed, justified such finding, I think the verdict must stand, and that the rule to set it aside and for a new trial must be discharged with costs.

A point was taken by *Mr. Ritchie* at the argument that as the defendant was in possession of the lots at the time the deed to *Robert Walker* was executed, the plaintiff could not recover. I have not noticed this point because I did not think it at all affected the plaintiffs' right to recover, it having been proved by *Robert Walker* that although defendant did enter into possession before he obtained a deed from the grantees, he had actually purchased the property before its execution and had it in keeping at the time. This being an uncontradicted statement, I thought it was a good answer to the objection.

WILKINS, J.—Whether both or either of the triangular pieces of land in dispute were, or was, or were not, or was not

covered in strictness by the description in the *Hamilton* grant, was at the trial, and probably ever will be incapable of being demonstrated. The difficulty has arisen from the fact of the western line of that grant, the western bound of the *Bayers'* and the eastern bound of the *Walkers'* being identical with that which in the grant is designated as a road communicating between the blockhouses. Of that road existing in 1763, the date of the grant, often patrolled it may be by Governor *Lawrence* and his brave soldiers in the night-watches, when the war-whoop of savages echoed along the adjacent roads menacing the picketted outworks of the nascent settlement then feebly struggling into life, but now rejoicing in the proud title of the great *City of Halifax*, no vestiges, save perhaps, the apocryphal sites of the blockhouses can be traced. The difficulty adverted to is greatly increased by the obvious consideration that that road may not have run between its extreme points or termini in a straight line. It is quite possible that it may have run from the termination of the line running S, 58 in or forty rods for a certain distance southerly and westwardly somewhat in the general course of the present wall, and afterwards diverged so as to leave or not to leave to the eastward of it, the triangular pieces of land which form the subject of this controversy. The wall was probably fixed conventionally and for convenience, not exactly on the road, but on a straight line. If so it can only conclude the parties for the extent of it, not for an extension of it opposite to the triangular pieces. There the question is open and it can only be decided in the absence of further evidence by possession, which is decidedly in favour of the defendant.

Thus the existing wall furnishes, in support of the plaintiff's verdict, no reliable evidence from whence it would, in my opinion, be competent to a jury to infer that a continuation of the wall in a straight line extended to the southern road would be in relation to the two triangular lots, the true western line of the *Hamilton* grant. This doubt on the clearest principles must operate in favor of the defendant who, being in possession of lots in dispute at the time of action brought, is entitled to hold them until the plaintiff's establish an eastern line for themselves that would include

the lots within their limits. But the case is marked by a stronger ground in favour of the defendant. The inference from the evidence is irresistible, that when in 1859 the title first vested in old *Walker, Bayers* was in the actual possession of the triangular lot below the road, while the fair inference—and inference so fair that the jury should have drawn it—is that the northern lot also was in the possession of the *Bayers* family. *Thomas Bayers* swore, and after he had testified neither of the plaintiff's was called to contradict him: The lot south of the road was first fenced, I think, twenty years ago; the fence is where it was originally put; I have cultivated in part and grubbed the rest; *Walker* put up the fence on the lower or north side of the triangle; it is fourteen years since I enclosed the north-east lot; old *Walker* was present when I fenced the south lot; he did not forbid; I did not know he claimed it till twelve or fourteen years ago, he then said the church land went up to the wall; he adds, I think both lots were then thus or fenced, I am sure the south one was.

Thomas Bayers, Jr., swore: "The lot was enclosed by my father twenty to twenty-one years." Now let us see how far, if at all, this is really opposed by the evidence of old *Walker*. He began by very loosely stating, speaking of the time when he conveyed the triangles to his son *Edward*, which was in 1868; "I was then in possession of them over twenty years." He contradicts this afterwards, besides his title did not begin previously to nine years anterior to that time. The defendants, he says, began to fence on the south part about fourteen years ago (that is before he had a title. He admits that the defendants have fenced in the property (that is of course the property in contention) and that they have held it ever since. He says, indeed when I purchased *Bayers* had not fenced, but that is not correct, for he more than once states the contrary. He says distinctly, and of course decisively against his claim, so far as the northern lot is concerned: On the south side of the road he (*Bayers*) had possession when I got my deed fourteen years ago. He added what does not vary the effect of his admission: I had it in claim then. Here arises a very obvious reflection, if he had it in claim then why did he defer so long prosecuting that claim.

I apprehend that although *Titus Smith's* acts done thirty years before the trial would not bind the then owning privy in estate of the plaintiff, he not appearing to have sanctioned them, still it is by no means unimportant in this case, that *Walker* admits that he went into possession under that survey, and that *Smith* made the line where the defendant claimed. To my mind it is clear, beyond doubt, that the inference from the wall is utterly inconclusive that the plaintiff has shown no right to maintain this verdict, and that even in view of his own admission, it cannot be sustained consistently with the plainest principles that govern an action of ejectment. The burthen of proof, of course, is on the plaintiff; he was bound to establish his eastern boundary, and until he established it, as he has failed to do, the defendant is entitled to rest on his possession. I think the rule should be made absolute for a new trial.

SMITH v. McEACHREN.

DEFENDANT, after a course of dealing with plaintiff, who kept a general store, came to a settlement in which, with his consent, all charges for spirituous liquors were deducted from his account, and an equal amount deducted from the credits to which he was entitled, then a balance being struck he gave his note for the amount thereof, which was the note sued upon. These facts, appearing from plaintiff's own testimony at the trial, the Judge was of opinion that under sec. 16 of R. S., chap. 19, (3rd Series,) the plaintiff should become non-suit, and on his declining to do so the jury were directed that plaintiff was not entitled to recover, and found a verdict accordingly. A rule nisi being taken to set the verdict aside.

Held, that it being clearly shown that the appropriation of defendant's credits to the payment of charges for spirituous liquors had been made with his full knowledge and consent, and without duress of any kind, there had been a misdirection, and a new trial was ordered.

RITCHIE, J., now, (February 5th, 1873,) delivered the judgment of the Court as follows:—

This action was brought to recover the amount of a promissory note; on the trial it appeared from the plaintiff's testimony that it had been given by the defendant to the plaintiff for the balance of an account, and at his being called and examined on the defence, he proved that \$4.91 had been deducted from the account for rum and other spirituous liquors; that on the settlement he had with the defendant when the note was given, and on previous settlements between them, he had deducted all charges against the defendant for

rum, supplied to him in less quantities than the gallon, and have struck off credits, to which the defendant was entitled; to an equal amount; and that on all these occasions the defendant had consented to this arrangement, which was made as he stated by way of payment for the liquor supplied to the defendant.

The learned Judge was of opinion that the plaintiff should become non-suit, and on his counsel declining to do so, he told the jury that the plaintiff was not entitled to recover, and they found accordingly for the defendant. A rule *nisi* was taken to set this verdict aside, on the grounds that it was against law and evidence, and for misdirection.

The only question involved in this case is whether the note declared on was or was not void under the 16th sec. of chap. 19 of the *Revised Statutes*, which enacts that no person shall recover or be allowed to set off any charge for intoxicating liquors in any quantities less than one gallon, delivered at one and the same time, and that all specialties, bills, notes, agreements, or accounts stated, given and made, in whole or in part, for or to secure any such charge, shall be void. There is nothing in the provisions of this statute which renders the sale of spirituous liquors in quantities less than one gallon illegal, the statute merely prevents the recovery of the price by action. The object of the legislature, as it appears from the language used, was simply to discourage its sale on credit, and this effect it unquestionably is calculated to have, as it puts it in the power of a purchaser to refuse payment and repudiate his note or other security given for the price.

Believing this to be all the legislature has done, or contemplated doing, I see little force in the objection insisted on so much at the argument, that there has been such an evasion of the law by the parties as the Court should not countenance; the law leaves it optional with the purchaser to pay or not, as he pleases, and it does not appear to me to be any more an evasion of it for parties on a settlement of their accounts to agree that certain payments, theretofore made should be applied to the payment for spirituous liquors which had been obtained in small quantities, than would be the withdrawal of all such charges from the account, and payment made for these in

cash at the time of such settlement. See *Owers v. Dextor*, 1 C. M. & R., 711.

Though much of the law which was adduced to us on the argument as to the right to appropriate payments, rather applies to cases where there have been separate accounts between the parties, as for instance an open running account, as this appears to have been, and one on a mortgage note or other independent account, yet some of them have a bearing on the question before us, though the strength of the plaintiff's case lies more in the special consent or agreement of the defendant, than on any application of the rules relative to the application of payments.

The general rule laid down with respect to the appropriation of payments is, that a party who pays money has a right to apply it as he thinks fit, and, if he does not make any application, the right devolves on the party who receives it, who may apply it to any debt due by the party making the payment, and the creditor may make the application any time before the case comes before a jury, unless he had previously communicated his election to the debtor; and if, as in this case, the contract on which the debt arises is not absolutely unlawful, but the creditor is merely prevented from suing upon it by a statutory enactment framed for the purpose of protecting the debtor, the creditor may appropriate the payment to the demand, the right of action for which is barred by the statute, and may sue for other debts; *Addison on Contracts*, 957. The author goes on to illustrate the position by saying, such is the case where the right of action is barred by the acts relating to the sale of intoxicating liquors on credit. And in *Philpot v. Jones*, 2 A. & E., 44, the Court held that if payments are made on account of a tavern bill containing items for spirits, together with other goods, and the tavern-keeper appropriates the payment in satisfaction and discharge of his claim for the spirits, his right of action for the rest of his demand is not affected by the statute; see also to the same effect *Crookshanks v. Rose*, 1 M. & R., 100; and *Dawson v. Remhaul*, 6 Esp., 24. These cases, and there are many others of a like character, go to show that under the *English* statute it was in the power of the plaintiff to have appropriated the payments to the discharge of the items in

the account for spirits in the absence of any consent on the part of the defendant, but where both parties have concurred in such an appropriation by express agreement, I can see no ground whatever for questioning its legality.

The *English* statute, 24 Geo. II., cap. 40, sec. 12, so closely resembles ours, that decisions on it afford safe proceedings for us. That statute permits the purchaser of spirituous liquors to resist the payment of what is purchased on credit in small quantities, and the Courts have decided that notes and other securities, given in whole or in part to secure such cheques are void, though the statute is silent regarding such securities.

I should not have been sorry to have found the provisions of the act more stringent, as I am quite alive to the evils attendant on the sale of intoxicating liquors throughout the country, especially when sold on credit, and I am quite prepared to give full effect to any enactment of the legislature which has for its object its discouragement, as far as its language and the rules of construction of statutes will justify, but to adopt the views of the counsel for the defendant would, I think, require me unduly to strain the language of the statute and violate these rules, and we must not forget that the enactment in question is very penal, and confers on a debtor the right of refusing payment for what he has purchased and promised to pay for, and made use of, and deprives the vendor of what is justly due him and but for the statute he would be legally entitled to recover.

There is a case, *In re Jones*, L. R. 9, Equ. Cases 66, lately decided by Lord Romilly, M. R., very analogous to this, on the *Solicitor's Act*, 6 & 7 Vic., chap. 73, which provided that no solicitor who had not a certificate, should be capable of maintaining an action or suit for the recovery of any fee or reward or disbursement, &c. The learned Judge said that as the clause of the statute was a penal enactment, it must be construed strictly, and the question was, whether the want of a certificate put an end to the debt or only took away the remedy. The distinction, he remarked, was a familiar one, and he held the debt still subsists, although the solicitor take no steps to enforce payment, and that the act did not take away the right of the solicitor to apply to its discharge money which was already in his hands.

I need hardly refer to what was said at the argument about compulsion or duress as operating on the defendant at the settlement, to induce his consent, as there was not a shade of evidence to lead to such a conclusion, he has neither pleaded it nor attempted to prove it, and we have no right gratuitously to assume that such was the case.

I am therefore of opinion that there should be a new trial.

MCDONALD v. BLOIS.

THE body of a deed acknowledged the payment of the purchase money in the usual form, and a receipt therefor signed by plaintiff was also endorsed, but subsequent to the sale a dispute arose as to whether the amount stated in the deed included a mortgage existing on the property, or whether the purchaser was to pay that also.

Plaintiff having sued for the amount of the mortgage,

Held, that in the face of the endorsed receipt, and of certain evidence adduced in confirmation thereof, he could not recover.

SIR W. YOUNG, C. J., now, (February 5th, 1873,) delivered judgment as follows:—

This was an action to recover \$400, the alleged balance of the purchase money of a lot of land conveyed to the defendant by the plaintiff under letter of license, as an administrator of his father's estate. The body of the deed acknowledged the payment of the purchase money in the usual form, and a receipt therefor was also indorsed, signed by the plaintiff, under which circumstance though the form of the writ was taken from *Bullen & Leake*, 246, and founded on the *Common Law Practice Act*, 1852, Appendix B., 7, it is very questionable that such an action can be maintained at common law. This court held in *Nelson v. Connors*, Oldright's Rep., 406, that it could not, and I have seen nothing in the more extended investigation, the point has now received to shake that opinion. The point of the case is, whether the purchase of the land was made for \$605 or \$1005, the difference being the principal money of a mortgage thereon to which the deed declares that the land was subject. Taken by itself, and without the receipt, I concur with Mr. Justice *DesBarres*, who tried the cause, in thinking that the true construction of the deed would have rendered the defendant liable for the mortgage money

besides the \$605 expressed in the deed, and there was evidence, too, upon the trial, sustaining that view which, perhaps, represents the real justice of the case, more especially as the defendant was not called to contradict it. And yet upon the legal principles that apply to it, and the mass of testimony for the defendant, it is difficult to disturb the verdict found for him by the jury. Both sides objected strenuously to the parol evidence received, but upon the equitable and other pleadings it could not have been rejected. The main inquiry is the propriety of receiving, and the legal effect, if received, of the receipt indorsed on the deed, which is in these terms: "**\$605.** Received from *Abraham Blois*, the sum of six hundred and five dollars, being the consideration money mentioned in the foregoing deed, being made in the following manner:

Amount on mortgage	\$400 00
Interest on do. to 10th February, 1870 . . .	52 33
Balance paid in cash on the delivery of the deed	152 67
	<hr/>
	\$605 00

(Sgd.) JOHN A. McDONALD.

Witness: *James McKenzie*, who is a magistrate and also a witness to the deed."

Now it is obvious that if a receipt so explicit was deliberately signed contemporaneously with, and to be taken as part of the deed, it explains and qualifies the recital and is conclusive of the point at issue. Much of the argument, therefore, turned upon the acknowledgments of payment of the purchase money in the body of the deed and in the receipt so indorsed.

In 1 *Greenleaf on Evidence*, 12th edit., sec. 26, note, it is said that in *England* the recital of the payment of the consideration money in the body of the deed is regarded as conclusive evidence of payment binding the parties by estoppel. And for this are cited the cases in *Willes*, 9, 25; 5 B. & Ald., 606; 1 B. & C., 704; 2 B. & Ald., 544. The *American* doctrine is to be found in 4 *Cruise's Digest*, by *Greenleaf*, 23 note, in 3 *Mason*, 347, 351, and in 6 & 7 *Johns*, 341, from which it would appear that the *English* rule has been adopted in *New York*, but rejected in most of the other States. In the same

volume of *Greenleaf's Cruise*, 264, it is said, "besides the consideration in the body of the deed, it is also usual and proper to indorse a receipt for the consideration on the back of the deed, signed by the party who receives the money." And it is to be noted that such a receipt so indorsed is stated as a fact in the cases of *Baker v. Deway*, 1 B. & Cr., 704, and *Lampson v. Corkue*, 5 B. & Ald., 606.

Our attention was called at the argument to a passage in 3 *Preston on Abstracts of Title*, 15, which runs thus, "As between the parties the clause in a deed acknowledging the receipt of the money is conclusive at law. In Equity it is considered mainly as a formal part of the deed, and therefore that Court looks to the receipt usually indorsed on the deed as the effective and essential discharge. In a transaction of a modern date, unless a receipt be indorsed on the deed, or if indorsed, unless it be signed this omission is presumable notice that the purchase money has not been paid, and imposes on a future purchaser the necessity of requiring evidence of the payment of the money, or obtaining a receipt or discharge for the same from the person to whom it ought to have been paid or from his representatives." We are all acquainted with the high reputation of *Mr. Preston* as a real property lawyer and conveyancer, but the latter part of this opinion published in the edition of 1802, is at variance with our usage, the receipt on deeds being now-a-days generally discarded with us, and the vendee, as well as the purchasers from him relying on the acknowledgments in the body of the deed. But when a receipt is indorsed and signed before or at the delivery of the deed, it must be taken, I think, as incorporated with the deed, and largely influencing its construction.

In *B—gh v. Preston*, 8 T. R., 483, the condition of the bond was controlled by a memorandum subscribed on it before the sealing and delivery, pledging the obligee not to bring any action or suit upon it, or to assign the same until after the death of the obligor, the defendant. The memorandum was directly at variance with the condition, just as the receipt here may be admitted to be at variance with the recital in the deed, yet the memorandum was held binding, having been annexed to and subscribed before the execution of the bond ;

and this decision, said Lord *Kenyon*, is fully warranted by the case of *Broke v. Smith*, Moore, 679.

In *Norton v. Wood*, 1 Russel & Mylne, 178, the obligee in a bond gave a written memorandum at the time of execution, that if the interest was regularly paid, it was not his intention to call in the amount for four years, and this letter was held by Sir *Lancelot Shadwell* to be a binding undertaking. Such being the legal effect of a written memorandum, letter or receipt on a sealed instrument, if indorsed or delivered at the time of execution, let us now review in brief the circumstances under which the receipt on the plaintiff's deed was signed. The land was sold by auction and was knocked down at \$605, as the highest bid. The dispute then arose as to the true character of the sale, and whether the price did or did not comprehend the mortgage money. The evidence on this point is conflicting, and declarations are put into the mouth of both parties fatal to their respective claims. Besides his declarations of value and intended purchase previous to the sale, the defendant is said to have admitted after the sale, that he had bought for \$605, and was to pay the mortgage besides. This, if true, is decisive of the merits. But the plaintiff, also after the sale, independently of other declarations that doubtless weighed with the jury, is said to have admitted that he had sold the place for \$605, and that when the mortgage was paid there would be about \$205 for the benefit of the heirs of the estate. The most decisive evidence, however, is that of *Fenton*, who was present at a conversation between the parties just before the execution of the deed.

The plaintiff was claiming the \$1005 when the defendant said that all he would give was \$605, and that if the plaintiff was not satisfied with that he might take the place and do what he liked with it. The deed was signed after this. Something was said about writing a new deed, and plaintiff said he thought it could be fixed as he wanted to go to town in the train. This evidence is confirmed by *James McKenzie*, the friend of the plaintiff, who wrote the deed, who adds that it was signed by the plaintiff without any objection, and that the plaintiff said to him before the deed was signed that he had agreed to settle the dispute in the way claimed by the

defendant; and so it appears from the receipt accepting \$152.67 as the balance of the \$605 after deducting the \$400 and the interest thereon.

This evidence disposes of the charge of fraud in the second replication, and of the plaintiff's complaint of his having been deceived by the defendant in receiving the money. It justifies also the jury in finding for the defendant, and this Court in refusing to disturb their verdict.

CAMPBELL v. McISAAC.

ACTIOX upon a special contract in the nature of a guarantee, alleging "that defendant gave a special promise, and made a special agreement to pay the plaintiff the amount due from one D. McI., the father of defendant." Defendant demurred, because, among other grounds, "the consideration for making or giving the special promise or agreement was not set forth in either count of plaintiff's declaration."

Held, that there should be judgment for defendant upon the demurrer.

MCCULLY, J., now, (February 5th, 1873,) delivered the judgment of the Court:—

This was an action upon a special agreement set out in the two first counts of plaintiff's writ and declaration in nearly the same language. In the first count as follows:

"That the said defendant gave a special promise and made a special agreement to pay to the plaintiff the amount due to the plaintiff from *Donald McIsaac*, the father of the defendant (at the time of such promise and agreement deceased) upon a certain account existing between the plaintiff and the said *Donald McIsaac* in his lifetime, and signed a memorandum or note thereof in writing, agreeably to such promise and agreement, but the defendant did not pay the said amount due on said account.

The second count omits the words above set out in brackets, namely, "at the time of such promise and agreement deceased," and alleges the debt to be one contracted by *Donald McIsaac*, a brother of the defendant, instead of the father, in all other respects the two counts are alike.

Thereupon defendant, by leave, &c., demurred, *first*, because the consideration for making or giving the special promise or agreement is not set forth in either count.

Second: Because the counts neither of them containing any allegation that the debt was not paid by *Donald McIsaac*, or that the same is still unpaid.

Thirdly: No allegation of performance by plaintiff of conditions on his part.

Fourthly: Because the agreement as set out is *nullum factum*, and without consideration.

Upon this there was a rejoinder, and now on the part of the defendant the demurrer was argued by *Meagher*, who contended that although sec. 3 last clause chap. 118, *R. S.*, like the *English Statutes*, 19 & 20 *Vic.*, chap. 97, sec. 3, dispensed with any consideration being set out on the face or body of a written guarantee, yet for the purpose of recovering upon it there must be not only a consideration set forth in the pleadings, but proof on the trial as well. That in this respect the law was not altered but remained precisely as it was before the statute. That there was no proper or sufficient breach of the alleged contract which should have negatived payment of the debt by the principal, and that there should have been an account for all conditions performed, &c., by plaintiff. For these positions he cited a number of authorities. The first of these being *Bullen v. Leake*, p. 59; there those learned authors say, "Where the declaration is founded on a simple contract it is essential that it should show that there was a good and sufficient consideration to support the defendants promise. If no sufficient consideration was alleged, or if the consideration upon the face of it were shown to be illegal, the contract would appear to be void. And in either case the declaration would be bad in substance."

Previous to the *Mercantile Law Amendment Act* of 1856, chap. 97, sec. 3, which we adopted in our Provincial Legislature in 1866, it was not contended by plaintiff's counsel but that the consideration of a contract must be set out in his declaration, but now since that statute, inasmuch as by reason only that the consideration for the promise need not appear in writing or by necessary inference from a written document, the contract is not invalid to support an action against the maker—it is not now necessary in *England*. But *Bullen v. Leake*, as above cited, lays down a different doctrine and follows it up by giving the form of the writ, p. 164 and

onwards, uniformly setting out the consideration which is the inducement to the contract.

First then, as to what is a guarantee. A "guarantee," says *Shaw, C. J.*, in *24 Pick.*, 252, "is a collateral undertaking to pay the debt of another in case he does not pay it. Distinguished from suretyship 'guaranty' is an undertaking that the debtor shall pay, 'suretyship' that the debt shall be paid." In *8 Pick. (Mass.)* 423, it is said that the guarantor warrants the solvency of the promisor. That a guarantor cannot be sued as a promisor, as the surety may, and that his contract must be especially set forth. The undertaking is essentially in the alternative. A glance at the counts in plaintiff's writ shows that the promise set forth lacks every element of a guarantee under these definitions and unless there be a consideration outside the instrument or contract in writing it falls within the definition of a *nudum factum*, as given in all the books *ex quo non oritur actio*. And the rule is "*nuda factio obligationem non parit*," *Bro. Leg. Max.*, sec. 717, as to what is a guaranty.

The case of *Holmes v. Whitehall*, 7 C. B., N. S., 359, lays down in the head note this proposition, "that though parol evidence may supply the consideration for a guaranty, it cannot be admitted to explain the promise." This was an action on a guaranty and decided in 1869, three years after the *Mercantile Law Amendment Act* passed in *England*. But it is worthy of notice that the declaration in this case by way of indemnity, sets forth a consideration for the guaranty which, upon its face, contained none, as also do all the subsequent cases. *Karslake*, there in shewing cause, commences thus, "There was no consideration for defendants promise," the 3rd sec., 19 & 20 *Vic.*, chap. 97, "although it dispenses with the necessity of showing a consideration upon the face of the document, does not dispense with the existence of a good consideration." This case decides that *Bain v. Matthers* is now, since the statute above referred to, no longer law, and that parol evidence may be given of the consideration of a guarantee, but not to explain the promise. *Selwyn*, in his law of *Nisi Prius*, page 43, says, "Consequently in actions of assumpsit, a consideration must be stated and proved. Bills of exchange and promissory notes are the exception." But on a close

examination of the counts set out in plaintiff's writ and declaration, I fail to discover the elements of a guarantee.

There is no forbearance, no future benefit, no credit to be given. This case is more like the case of *Dixon v. Hatfield*, 2 Bing., 439; 10 *Moore*, 42, where the contract was, "I agree to pay M. for timber to house in A. C. out of the money I have to pay W., provided W.'s work is completed." *Held*, "This was not a guarantee to pay if W. should fail; but a direct undertaking to pay when the work should be completed." It is worthy of note in passing, that the preamble of the *Imperial Act*, 19 & 20 *Vic.*, chap. 97, commences thus: "Whereas inconvenience is felt by persons engaged in trade by reason of the laws in *England* and *Ireland* being in some particulars different from those of *Scotland* in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience it is expedient to amend the laws of *England* and *Ireland*, &c., &c.; be it enacted, &c., &c." It would not seem from this that the mode of enforcing contracts, nor pleading them, if the practice of the Court was intended to be altered in any way, nor has this been the result as far as I can ascertain. Sec. 2nd, *Chitt. on Pleading*, 231.

In 1st. *Chitt.*, p. 297, it is laid down that in declaring upon a promise to pay money in consideration of a forbearance of a proceeding debt, some cause of action must be alleged. Citing 4 *Taunt*, 117.

Hart v. Miles, 4 C. B., N. S., p. 371, is an instance of the rule as laid down by *Bullen & Leake*, being complied with, the consideration is set out in the declaration. Indeed I find no case, early or late, where such has not been the practice. The averment of it being a special promise as contended by plaintiff's counsel, is not sufficient. See *Bro. Stat. Fraud*, sec. 163, a special promise means only an actual, as contrasted with an implied promise.

Assuming that it is absolutely necessary that a plaintiff, to recover on an agreement like that set out in his suit, must prove a consideration and *Holmes v. Whitehall*, *supra*, is conclusive, upon that point then, it would operate it seems to me, as a snare to a defendant, if a plaintiff could, at the trial, prove any consideration of any kind verbal or otherwise, and

failing one resort to another till at length he surrendered. The inducement, as it is technically called, since the recent statute becomes not only important, but in an action like the present, the really essential portion of the pleadings. *Aldershaw v. King*, 2 H. & N., 399, and also *Westhead v. Spencer*, 6 H. & N., 728, make this very manifest.

It is to be borne in mind that we have not enacted the 3rd sec. of 19 & 20 Vic., chap. 97, in terms which is as follows, "No special promise to be made by any person after the passing of this act to answer for the debit default or mis-carrying of another person, being in writing and signed by the party to be charged therewith, or some other party by him thereto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding, to charge the person by whom such promise have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." The language of the above is verbatim that of the *English Statute of Frauds*, 29 Car., Q. C., 3 & 4, as far as onward "authorized"—and *Bullen & Leake*, note a, page 162, remarks thus, *this section only affects the evidence of the contract, and not the mode of pleading it*. We, instead of this substantive enactment, at the close of sec. 3, chap. 118, *Revised Statutes*, which consolidates several sections of the *English Statute of Frauds*, have this language, "Provided always that it should not be necessary that such agreement, memorandum or note shall specify the consideration upon which it is given"—so that this proviso operates not merely upon a promise to answer for the debt, default, or miscarriage of another, as in *Great Britain*, but upon all the various previous contracts enumerated, viz.: upon "agreements upon consideration of marriage, contracts on sales of land, or contracts to be performed within the space of one year from the making thereof," as well as to "contracts to charge executors or administrators upon special promise to answer damages out of their own estate." And yet, though much more comprehensive than the *English* statute, as regards the question before the Court, namely, the receipt for setting out a consideration in the pleadings, I am unable by any refinement to draw any distinction in the proper and reasonable construction of the two statutes. I

always regret to find any variation, the slightest in the wording of statutes where the Provincial Legislature evidently means to copy Imperial Legislation.

It is a course pregnant with difficulty and embarrassment, and adapted to provoke litigation. I say this much, although in the present case I find no authority, as already remarked, for assuming that either the *Statute of Frauds* or the *Merchandise Amendment Act, 19 & 20 Vic.*, has changed or in any way altered the modes of pleading in a case like the present.

As regards the alleged want of a proper breach in the plaintiff's writ, and an allegation that the principal had not paid his debt, that also is, I think, objectionable. The forms in the books would seem certainly to require it, and reason suggests that the foundation of plaintiff's right to recover must be based upon the fact that the principal had himself not paid his debt. I think there must be judgment for the defendant upon the demurrer. I do not enlarge as regards the want of an averment of conditions performed by plaintiff, because none appear upon the record, and for aught we know, there were none to be performed.

BOYD v. MILLETT.

To acquire a colorable title to land under a void deed there must be open and continued acts of possession of some part of the land contained within the deed. Where the deed relied on as giving color of title gives no boundaries, description, or designation of the land, it can have no effect beyond the actual occupation or improvement.

(February 5th, 1873,) delivered the judg-

commenced in 1863, and first tried in
 alting in a verdict for the plaintiff, which
 he unanimous decision of the Court; a
 e taken place with the same result, and
 is to set aside this verdict also.

ge who tried the cause told the jury, I
 the plaintiff had entirely failed to deduce
 to the two lots in question, from the

original grantor, and I cannot see that he has shewn any right to them by possession or otherwise, to entitle him to recover in this action.

A deed was produced from *William Nesbit* to *Richard and Daniel Boyd*, dated 14th *February*, 1777, of all his right, title and interest in certain tracts of land in *Falmouth*, at the forks of the river *Pisiquid*, and described by the lots as follows, Nos. 73, 75 and 76 in the front range, and Nos. 77, 78, 79, 81 and 82 in the back range, being the first division of seven rights and part of the eighth in the said township; also a deed from *Daniel Boyd* to the plaintiff, dated the 8th *March*, 1844, of all those certain farm lots, Nos. 35, 36, 44, 64, 65, 66, 67 and 68, situate in *Falmouth*, bounded and described in the plan of said township, and distinguished by letter "D.," each and every of said lots containing 400 acres, more or less. This latter deed was recorded on the 14th *September*, 1865.

The controversy in this suit is with respect to the two lots, Nos. 64 and 65, mentioned in the deed to plaintiff, and it was in proof that previous to the giving of this deed he had been on the land with *Daniel Boyd*, his father, when he was hauling timber to a mill to make timber, which was taken from lot 64, and that his brothers cut on the land, and he states that though he did not know at the time that the cutting was on that lot, he had discovered it since; he also says that he had not been on the lot from the time he was there with his father, and it appears that the lots in question had not then been surveyed or run out.

These acts of the father, followed by a partial survey of the lots in 1864 by the plaintiff, are the only acts ever exercised by them on the lots till the commencement of this action, yet it is contended that the plaintiff has a right to obtain possession from a party who has been living on the land for many years, on the ground that *Daniel Boyd*, the father, having had a deed from *Nesbit*, though invalid, and the plaintiff having a deed from his father which professed to transfer the lots to him, had such a paper title as in connection with the acts of his father, anterior to 1844, and with that of the plaintiff in 1847, ought to operate and prevail against the defendant.

I cannot adopt this view of the case, *Nesbit* never was in possession of lots Nos. 64 and 65, there is no evidence that he owned them or claimed, and, if he had in fact owned them, they would not, in my opinion, have passed under the deed to the *Boyd's*; lots Nos. 64 or 65 are not mentioned or referred to directly or indirectly in that deed, they are not situate at the forks of the river *Pisiquid*, as the lots are therein described to be, but some ten miles distant, and it would, I think, be giving far too great a latitude to the words used in the deed, if we were to hold that by the enumeration of certain lots, other lots enumerated ten miles distant were to pass without any reference to them as being appurtenant, other than the statement that the enumerated lots were the first division of seven rights and part of the eighth in said township; I see nothing in the deed to lead me to the inference that the grantors intended to convey anything beyond the lots enumerated; if the intention had been to cover the lots in question, other and more explicit reference must have been made to them; I cannot therefore assume that *Daniel Boyd* was in possession of them under color of title, if he was in possession at all when he made the deed to his son. But even if *Boyd*, the father had, on the occasion referred to, taken the timber from the lots, claiming title under that deed, and the plaintiff who did claim them under color of title in 1847 had the survey made as testified to, I am still of opinion he would not be entitled to maintain ejectment against the defendant.

There is no ground whatever for contending that independently of the paper title or color of title there was such prior possession, or in both combined, as would be sufficient to enable the plaintiff to maintain ejectment. On this point the language used in the judgment in *Freeman v. Allen* is very decisive: "Prior possession is only sufficient," the learned Judge (*Wilkins*) said; "where the plaintiff has had open, notorious, exclusive and well defined possession of land, and being so possessed, the defendant has entered upon him and deprived him of such possession by force or fraud, the defendant went into possession of nobody's when he took possession of the land."

Now the acts of *Daniel Boyd*, done before the running out of the lots, or their locality ascertained, were neither notorious, exclusive, or well defined acts of possession of the lands, and the very house in which the defendant resides, and has long resided, with the clearing attached, was in the occupation of a party holding adversely to the plaintiff at the time of his survey in 1847, when the plaintiff himself says the cross lines were not run. That they sighted a few rods and went down a piece and concluded that *Vaughan's* house and clearing, now in the occupation of defendant, were on No. 65, and it is in evidence that *Vaughan* was in possession in 1844, and had been some years previously, and when known by the plaintiff to be in possession in 1847, no attempt was made to dispossess him. It is true that the possession of the defendant cannot be connected with that of *Vaughan* so as to give the former a title by possession, as there is no conveyance shown from the one to the other, yet being found so in possession and having remained on the land, as the plaintiff says, for about thirteen years, the defendant, nineteen, he surely cannot be turned out by one who has no legal title, and no possession other than that which is to be inferred from the acts in evidence.

It would be a most dangerous principle to establish that a party going upon an unsurveyed and undefined lot, and taking timber from it a few times, even though he claimed a right to do so under a void deed, would acquire a seizen or possession of the land so as to enable him to convey a title to another; and it would be equally dangerous to hold that the grantee, under such a deed, without any other act than a partial survey of the land many years ago, should be entitled to dispossess one who had entered peaceably, the plaintiff not being and never having been in possession, and resided on it without interruption for from thirteen to nineteen years, as the defendant in this case has done.

I am quite content to follow the authorities which recognise the distinction between a possession of land under color of title and one without it to their full extent. But I know of no cases which gave such effect to an entry on land under color of a void deed unaccompanied by open and continued acts of possession of some part of the land embraced within

the deed. Color of title merely, and without open and notorious occupation of some part, says *Angel* in his work on *Limitations*, is not a disseisin, though by the ancient doctrine a simple feoffment had a larger and more transcendent operation. Before the case of *Doe. d. Atkins v. Horde*, 1 Burr., 60, it seems to have been the settled doctrine that a feoffment would create an estate of freehold in the feoffee, though none was in the feoffor at the time of the feoffment, but the decision in that case and others subsequent, have very much broken in upon this ancient doctrine as to the efficacy of a simple feoffment. The good sense and liberal views, says *Kent* [2 Com., 473,] which dictated the decision in *Atkins v. Horde*, seems to have finally prevailed in *Westminster Hall*, notwithstanding the opposition which that case met with from the profession. The Courts will no longer endure the old and exploded theory of disseisin, they now require something more than mere feoffments and leases to work in every case the absolute and perilous consequences of a disseisin in fact.

In the case of *Little v. Meguire*, 2 Me., 176, referred to in 2 Washb. on Real Prop., 498, the claimant entered under a void deed, which was duly recorded, describing the land and caused the boundaries of the same to be run out according to the deed, and paid taxes thereon for many years; the land was wild and uncultivated, but it was held that these acts did not work a disseisin of the true owner, for to do that the grantee must have entered on the land and continued openly to occupy and improve it, and it is to be borne in mind that in the deed from *Nesbit* there are no boundaries, or description, or designation of those lots, and without some description of the land, I do not see how a deed relied on as giving color of title can ever lay the foundation of an available adverse possession beyond the actual improvement or occupation, as no indication is given by the deed of what the party intends to claim. See *Angel on Limitations*, 412, and 2 Washb., 497. There is no doubt, a difference between the presumption of seisin in fee afforded by possession for twenty years, and that for a less period, the one giving presumption of it against all the world, the other against a wrong doer only. In this case the defendant having entered peaceably on the land of which the plaintiff

was not in possession, and having occupied it for several years, has the presumption of seisin against all persons but the lawful owner of what he has so occupied, but the plaintiff and those under whom he claims never had any possession which would give a presumption of seisin. In *Nichols v. Todd*, 2 Gray, 568, it was contended that there was prior possession under color of title, and that it was sufficient to maintain the action against one who had no title. The plaintiff had purchased the land in question at auction, the owners, a corporation, gave him a deed which, it appeared, had not been duly executed. He entered on the land for the purpose of making surveys, after this the defendant entered without title; a deed properly executed was subsequently made to the plaintiff, which was held to be inoperative, as the defendant had then disseised the grantors and was in possession of the lot. The Court held that the defendant must recover on the strength of his own title; "he cannot," said *Bigelow*, J., "stand upon his paper title, the deeds being defective, and having no title by deed he shows no possession of the estate, the mere entry on land without any actual possession affords no sufficient proof of title even against a person who subsequently takes and holds possession. Mere possessory right is the title known to the law. Proof of entry only, without some act of ownership or continued occupation, will not sustain such a title. It must appear that a party claiming land by possession has entered thereon and has indicated in some way the extent of his claim, and that possession followed the entry and was kept up according to the nature and situation of the party."

The Court has already pronounced on the law of this case; for after carefully reading the notes of the former trial, I can find no material difference between the evidence adduced there and that which was given on the late trial. A suggestion was thrown out by the Court that certain evidence, if produced at a subsequent trial, would strengthen the plaintiff's case on a point in which it was considered defective. This has not been done. I think, therefore, the rule for a new trial should be made absolute.

McDONALD v. BLOIS.

IN an action to recover consideration money expressed in a deed, if estoppel is relied upon, it must be pleaded.

Where a deed is free from ambiguity it neither demands nor will admit extrinsic aid to construction, but must speak for itself.

A memorandum endorsed upon a deed, but not distinctly proved or admitted to have been so endorsed at the time of the execution of the deed cannot, even if consistent therewith, be read as if incorporated with it.

WILKINS, J., now, (February 5th, 1873,) delivered the judgment of the Court:—

This case appears to me, entirely free from difficulty, whether viewed in the light of the common law or of equity. Both courts, alike, recognize the rule, that with certain well-known exceptions, that do not touch the present question, parol evidence is inadmissible to explain a deed or a written instrument. In both it is a rule that parol evidence, inconsistent with a deed, ought not to be received. Such is the express language of *Best, J.*, in *Baker v. Dewey*, 1 B. & C., 710. In *Hall v. The Manchester Waterworks*, 2 B. & Ad., 553, it was ruled that an obligor, sued on a bond reciting a certain consideration, is estopped from pleading that the consideration was different, unless he can make it appear by his plea that the real transaction was fraudulent and unlawful. In that same case *Taunton, J.*, said, "*Shelly v. Wright (Willes, J.)* is a clear authority to shew that a party is estopped by his own recital of a particular fact in a deed." The reception, he added is "where fraud or an illegal purpose can be shown." The following is the view entertained by equity: The Master of the Rolls said, in *Palmer v. Newell*, 20 Beav., 39, "On a question of construction of a deed, parol evidence is inadmissible to show the intention of the parties thereto." In *Croome v. Leddiard*, 2 Mylne, & Kean, 261, Lord Brougham said, "in the present case the purpose for which parol evidence is tendered, on the part of the defendant, was not to enforce a collateral stipulation, but to show that the transaction was conducted on the basis of an exchange; a circumstance which, if true, was totally at variance with the language and plain import of the instrument." Respecting this his Lordship said, further, "Nothing could be more dangerous than to admit

such evidence, for, if the argument between the parties were in fact conducted on the basis of an exchange, why was the instrument so drawn as to suppress the real nature of the transaction?" Mistake, surprise, and fraud are well-known exceptions, and where either is charged, the vigorous rule of exclusion is relaxed; *Cloves v. Higginson*, 1 Ves. & B., 524. Thus Lord *Eldon* expressed himself in *Winch v. Winchester*, 1 V. & B., 378, "if the defendant insists that the evidence of the auctioneer's declaration at the sale, of the quantity of acres sold, being received, he will be entitled to have the contract performed with the abatement of the price. I think it not admissible for that purpose, as the Court cannot execute in his favor a written agreement with a variation introduced by parol testimony."

In *Trail v. Ellis*, 16 Beav., 350, and *Greenlade v. Dare*, 20 Beav., 184, both of which were cited at the argument, fraud was charged, and therefore they both came within the exception noted above. They are important in one sense, viz., as showing the light in which equity regards the absence of a receipt for purchase money, by indorsement on a deed. They suggest strikingly, the prudence of making such indorsement of the actual payment of the consideration money named in a deed. Where the deed expresses formally payment of the consideration money, with the usual acknowledgment, if in point of fact it has not been paid, the seller of the land is clearly without remedy at law; and I apprehend it is not quite certain that he has, if the case is not marked by fraud, mistake, or accident, capable of being distinctly shown, any remedy in a Court of Equity. It, like, a Court of Common Law, cannot release a rule equally recognized in both. *Greenleaf* writes, sec. 26, N. 1, "The American Courts have been disposed to treat the recital of the amount of money paid as not affected by the principle of estoppel. They regard it as only *prima facie* evidence of the amount paid in an action to recover the price which is yet unpaid." The applicability of these extracts from authorities consulted to the present case will, I think, appear so obvious when the real points of our inquiry, which are few and plain, are stated, that it will be quite unnecessary for me to point out their particular application. The action is *assumpsit*, brought to recover a portion asserted by

the plaintiff to be due to him by the defendant, of the consideration money—for the land and premises conveyed by the deed in question—a deed poll-executed by the plaintiff to the defendant, and which formally recites with the feoffor's acknowledgment, the full consideration money to have been paid, at or before the ensealing and delivery of the deed. The material pleadings are as follows:—defendant taking equitable grounds says, "I bought the land at auction for \$605, being the full amount to be paid for a clear, unincumbered title, which land was, at the time, incumbered by a mortgage set out; and after the sale I paid plaintiff, and he accepted, \$152.67, as the balance due to him in full on the purchase, after deducting \$452.33 due on the mortgage; and I have paid interest on the mortgage to the mortgagee; and I hold the land subject to that mortgage which I have undertaken to pay off." To this plea the plaintiff has replied in our form strict matter of estoppel. He says, "You, the defendant cannot be admitted to plead as you have pleaded, because your plea contradicts your deed—the deed referred to in your plea—for that deed recites that the land in question was sold to you subject to the mortgage, and that the mortgage remained incumbered on the land, and because, after that recital, the deed avers that I, the feoffor, from whom you bought in consideration of the premises and of the sum of \$605 in hand paid by you, conveyed the land to you—and further, the deed has been executed and you have accepted it, and placed it on record, and have gone into possession under it,—but you have not paid the consideration money." The plaintiff concludes with a verification and a prayer of judgment if defendant shall be admitted against his own deed, to say what he has said in his said plea, and (among other things in the plea set forth) to say that the sum of \$605 (the consideration expressed in the deed) was the full amount to be paid by the defendant for a clear, unincumbered title to the said land, &c., &c., &c. In *Chitty's Equ. Digest*, 815, I find the following passages: "If estoppel appears on the record, and issue joined, if jury find verdict against estoppel, yet judgment shall be given according to the estoppel and not according to verdict, because says *Year Book*, 11 H. & C., 42, verdict

is nothing to purpose, being mere feofail to try a matter contrary to the record. 1 *Ridge*, P. C., 247 ; 1 *Rridge*, 658.

I notice as remarkable, that to this replication of estoppel no demurrer has been filed, and no rejoinder made, I should search in vain in *English* books for such a state of pleadings as was thus presented at the trial. That replication was of course, an appeal to the Court, and not to the jury. Plaintiff has replied "that the plea referred to was bad on account of the estoppel." The answer to the plea is not expressly or impliedly questioned by the defendant. See 3 *Chitty Pl.*, 421 ; also a precedent of pleading in point in *Outram v. Morewood*, 3 E. R., 346 ; also *Wilkins v. Wingate*, 6 T. R., 62 ; in both of which cases there was a demurrer, bringing the matter to a point. In the view I take of the question generally, I need not pursue this point of inquiry further. To what I have already said, I add that such an estoppel as is pleaded here would demand, and would receive the judgment of a Court of Equity. The construction of this deed is, of course, for the Court, and it is to be construed according to the intention. The question of intention respects the point whether the consideration was and is \$603 exclusive of the mortgage, constituting an incumbrance on the land when sold, or \$605 exclusive of the amount then due to the mortgagee on the mortgage. To my mind the intention, derivable from the whole deed, is transparent to the effect that the purchaser was to pay the money consideration in full, independently of the mortgage.

A plain farmer, examined as a witness at the trial, showed that he so read the instrument. I mean *McKenzie*, the person who prepared the deed. He saw so clearly that the deed expressed a consideration in money amounting to \$603, that after it had been discussed by the parties about indorsing a receipt, showing a settlement on a different principle, this witness said to parties, before the deed was executed, "that it ought not to be signed, and that another deed ought to be drawn." This was remarked obviously, because he saw the repugnancy between the deed and the memorandum which was afterwards indorsed upon it. Whether the deed was or was not executed before the memorandum indorsed was signed by the plaintiff, is a matter of perfect uncertainty from

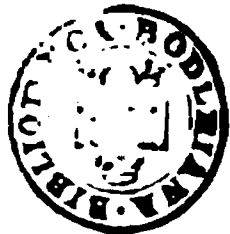
the evidence. The deed was executed and the memorandum signed at *Scott's* on the same day, and as parts of the same transaction; but the order of execution and signature in point of time is altogether unproved. On the point of this uncertainty contrast with this case *Burgh v. Preston*, 8 T. R., 483, in which case a memorandum on the bond is averred to have been written, annexed and subscribed to the bond "before the sealing and delivery thereof, &c., &c." See *Newton v. Wood*, 1 Russ. & Mylne, 178. The deed is before us. Let us examine it in order to elicit, if we can, from its four corners, the intention on the point in question. It is an administrator's deed. It is dated the 14th of *April*, 1870. It recites (I use the very words) that on the 10th of *February*, A. D. 1871, being the day appointed for such sale, the tract of land hereinafter described, being part of the real estate of the said deceased, was (note, this refers to a time four days anterior to the date of the instrument, set up at public auction and knocked down to the defendant) he being the highest bidder, for the sum of \$605, the said land having been sold subject to a mortgage (which mortgage is described.) At the argument it was contended that the language of this recital does not necessarily imply that the purchaser was to pay the \$605, and pay the mortgage also, or take the land chargeable with it also; but surely, in the intendment of common sense, it can bear no other meaning. If an auctioneer, about to sell a piece of land, were to announce, "this land, which is subject to a mortgage for £100, is now offered for sale," and A. were to bid it off at £100, he would, by ninety-nine men out of one hundred then present, and hearing the announcement and the bid, be understood so to have bought, that he would expect (not gratuitously to enjoy the land charged with the mortgage, but) to pay to the auctioneer or to his principal, both amounts. Now the mere identity of the sum bid with the sum charged can make no difference in the construction of the phrase, "subject to a mortgage," relatively to the case supposed and the case before us. If the language of the recital had been "the tract of land thereafter described, subject to a mortgage on it for £400, was set up at public auction and knocked down to the defendant for the sum of \$605," no doubt could be felt as to the meaning; but the words are the same. They have

in this way of putting them, been merely transposed. But there is a further recital, viz., "which mortgage remains (*i. e.*, after the recital of the sale for \$605, and at the execution of the deed four days after the sale) encumbered on the said land and premises." Why should this last recital have been made, at all, on the supposition of the amount of the incumbrance constituting a part of the consideration of \$605? Finally, the plaintiff in the operative part of the deed, grants "in consideration of the premises" (*i. e.*, of the recited fact of the continuing incumbrance) and of the aforesaid sum of \$605 now paid, &c. &c.) The deed, then, I mean, of course, the deed without reference to the indorsed memorandum, is free from all ambiguity. It must speak for itself. It neither demands nor will admit of extrinsic aid to construction. The memorandum not having been distinctly proved or admitted, as in *Burgh v. Preston*, to have been indorsed at the time of the execution of the deed, could not, even if perfectly consistent with the latter, be read as if incorporated with it! There is no pretence of fraud, mistake, or accident in the equity sense of either of those words. The deed was executed advisedly and deliberately. Fraud is asserted in the pleadings in reference to the memorandum indorsed, but not in relation to the deed. This being a case in which estoppel, if relied on, could be pleaded, estoppel to be made available must be pleaded. Estoppel has not been pleaded in relation to the amount of the consideration expressed in the deeds to have been paid. That, therefore, was, at the trial, an open question, provided it could be opened up consistently with the rules and principles of equity law. That, as I conceive, was the only matter really subjudice at the trial, excepting the effect of the plaintiff's replication by way of estoppel. As to how far equity would permit the question of the amount of consideration actually paid to be enquired into, where no fraud is charged in relation to the deed, it seems to me unnecessary to consider, for there is no dispute as to the fact of \$152.67 alone being paid. If the mass of oral testimony received at the trial was admissible (I think the whole of it should have been rejected,) still the finding in view of that portion of it on the point of intention as to the bargain which was in conflict, could not, in my opinion, be allowed to stand, inasmuch

as there was evidence given by the plaintiff, and uncontradicted by the defendant, who was not produced to contradict it, which created such a preponderance in his favor, that the jury should have found for him in respect of it.

The plaintiff swore, first, that defendant told him he had bargained with plaintiff's father for the place, and to pay him \$600 besides the mortgage; and secondly, that when on the morning of the sale, defendant desired to know plaintiff's lowest price, plaintiff informed him that he would not let it go lower than the old bargain. That, in my judgment, was so suggestive (I might almost add, conclusive) as to what the defendant understood the terms of the sale to be, that it super-added to the rest of plaintiff's testimony, created an imperative necessity for the defendant to come forward and contradict it, (if he could) as to cause it to be shown why he could not appear to testify in explanation of it. I have reached an undoubting conclusion that the rule to set aside the verdict should be made absolute.

SANFORD v. BOWLES.



PLAINTIFF was entrusted with the possession of certain goods by the owner, who was about to leave the Province, to be forwarded to him. With this intention the goods were sent to a wharf to be shipped by a vessel then lying there, but there was no formal delivery to the master or any one on board. The defendant, who showed no justification, caused the goods to be taken and sold.

Held, that until the assent of the master of the vessel to receive the goods was shown, they remained in the possession of the plaintiff as special owner, so as to enable him to maintain an action against a wrong-doer.

DODD, J., now, (February 5th, 1873,) delivered judgment:

This is an action against the defendant for the conversion of the plaintiff's property, tried before Judge *Wilkins* at _____, when a verdict was found for the defendant. A rule *nisi* for a new trial was granted and it was argued during the present term. The plaintiff is the father of *James Sanford*, who went to the *United States* some time previous to the commencement of this action, leaving with his father the articles in question in this action to be forwarded to him in the *United States*, and they were packed up with that inten-

tion, and sent to a wharf twelve miles from the residence of plaintiff, designed to go by a vessel then at the wharf. Before the son's departure for the *United States*, he and the plaintiff had gone to where the vessel was to ascertain if there was one there to send the articles by, and in consequence of which the articles were sent to the wharf; but it does not appear that any communication took place either by the plaintiff or his son with the master, or any other person on board the vessel, when they went to where she was, nor does it appear there was any communication between *William Sanford* and any person belonging to the vessel when he took the articles under the direction of his father and placed them on the wharf. The plaintiff says he did not deliver the articles to the captain of the vessel. They were subsequently taken by a person calling himself a constable, under the direction of the defendant, who also directed their sale, and they were sold. The cause was very imperfectly tried on the part of the defendant. For all that appears to the contrary, he was a stranger and a wrong-doer, as by his plea he only denies property in the plaintiff, without justifying the taking and converting the goods to his own use. He called no witnesses at the trial, moved for a nonsuit when the plaintiff closed his case, which the learned Judge refused to grant, and left the case to the jury on the issue of property in the plaintiff, and they found for the defendant.

This case must be decided upon the evidence for the plaintiff, as it is uncontradicted, and by that he had a special property in the goods, was in fact a bailee in possession, and that is sufficient to maintain an action against a mere wrong-doer. *Jefferies v. Great Western Railway Company*, 5 E. & B., 802. The mere possession is sufficient against a wrong-doer, *Armory v. Delamirie*, 1 Strange, 505. The principle established by those authorities is conclusive, and the only question here is, did the plaintiff part with that possession by sending the goods to the wharf with the intention of forwarding them by a vessel then at the wharf, to the absolute owner in *Boston*. There is no evidence to show how long the goods had been on the wharf before they were taken by the direction of the defendant; whether immediately after they were deposited there, and before the master of the vessel

had time to take charge of them. In my opinion, before the plaintiff was divested of the special property he had in the goods, the assent of some person in authority on board the vessel to recover them must be shown. In a case in some particulars not unlike the one under consideration, the question was as to the property vesting in the plaintiff in the cause, and *Parke, B.* said that if the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels is established, and they are placed in the hands of a depository, no matter whether such depository be a common seaman or ship master, employed by the assignor or a third person, and the chattels were so placed on account of the person who is to have that property, and the depository *appeals* it is enough, and it matters not by what documents this is effected 4 M. & W., 775; and if "A." order a tradesman to send him goods by a hoyman, and the tradesman send the goods by a porter to the house where the hoyman resides when in town, and the porter not finding him there leaves the goods with the landlord, "A." cannot maintain trover against the landlord, for the property never vested in "A." but remained in the tradesman, 2 *Selwyn's N. P.*, 1380. So I say here the absolute owner of the property could have no action against the master of the vessel, because there was no assent on his part to receive the goods, and until that assent was given they remained in the possession of the special owner, the plaintiff. As I have already said, the defence was not well conducted, the pleadings were defective and did not justify the acts of the defendant, and in view of the whole case I think it should go back to a second jury, therefore the rule for a new trial should be made absolute without costs.

COOK ET AL. v. McLEOD.

A CHARTER party contained the following clause : " It is agreed that the responsibility of the charterer ceases as soon as the cargo is on board, the vessel holding a lien on the cargo for freight and demurrage." Plaintiffs sued defendant (the charterer) for the freight, setting out in their declaration that the vessel was loaded and proceeded to sea with her cargo, and delivered the cargo, &c.

Defendant demurred.

Held, that the demurrer should be sustained, as the declaration showed that defendant was not liable.

WILKINS, J., now, (February 5th, 1873,) delivered judgment as follows :

The sole question of law raised by the demurrer to the count in this case depends on the effect of these words in the charter party, which are introduced into the count, viz., " it is agreed that the responsibility of the charterer ceases as soon as the cargo is on board, the vessel holding a lien on the cargo for freight and demurrage."

The count alleges that plaintiffs' (and one *Shaw*, since deceased) owners of a barque, by their agent entered into a charter party not under seal, with the defendant (personally) whereby it was agreed that the barque, then in *New York*, should proceed to *Richibucto* to take on board from the defendant (or agent) a full cargo, &c.; and being so loaded should therewith proceed to *Bristol Channel*, &c., into the *Clyde*. &c., and deliver the same, on being paid freight (as specified.) The count further sets out a provision of the instrument, viz., " If ordered to *Bristol Channel*, and cargo discharged at *Gloucester*, 2s. 6d. additional to the above rate (the before specified rate) to be paid." Then follows a provision for payment of the freight in these words, " Freight payable as follows, viz., one-third in cash on arrival, and remainder in bills on *London*, at four months date, approved by the master or owner, or in cash with two per cent. discount, at shipper's option, (the shipper in fact being the defendant). Then follows the provision in question. Plaintiffs' then aver that the barque when loaded, proceeded to and unloaded at *Gloucester*, as ordered, that plaintiffs' and the deceased performed all conditions, &c., and that the defendant, as shipper of said cargo, by himself or his lawful agent or order in that behalf, made his option to pay said freight in cash, on arrival

whereby plaintiffs' and the deceased became entitled to receive £453 19s. 3d. Stg., less discount, in the manner, and at the times, and with interest, set forth in the third count, but the same hath not been paid to the plaintiffs.

To this count defendant has demurred, because the charter party set out absolves the defendant from liability after the loading of the cargo, and confines the remedy of the plaintiffs' for their freight to their lien for freight and demurrage; and because the count admits that the vessel was loaded and proceeded to sea with her cargo, and so shows that the defendant is not liable. After carefully considering *Oglesby v. Yglesias*, 1 E., B. & El., 930; *Milvain v. Perez*, 3 E. & E., 495, and the more recent case of *Bannister v. Breslauer*, 2 L. R., C. B., 497, which reviews and approves the two preceding authorities, I think our judgment should be in favor of the demurrer. *Erle*, J., in giving his opinion in the first mentioned case said, "It may seem improbable that the owner would leave himself without a remedy at the port of discharge; still if he chooses so to contract, it is not in our office to interfere." It is impossible to construe the charter party otherwise than as exempting the defendant from all liability after shipment of the cargo. In that case, indeed, the contract was made by an agent who named no principles, and who, therefore, as contracting party, protected himself by a clause substantially like that in question here. The action there was brought for demurrage. Next in order of time came the case of *Milvain v. Perez*, 3 E. & E., 495. There also the defendants who executed the policy were agents of foreign charterers. The policy contained a stipulation that, as defendants were acting for foreign principles, "all liability of defendants in every respect, and as to all matters, or things as well, before and during as after the shipping of said cargo, should cease as soon as they had shipped the cargo." Defendants having loaded and shipped the agreed cargo, plaintiffs afterwards sued them for not having shipped it in regular turn. Held, that the action would not lie, for that the charter party limited defendants liability to the actual shipment of the cargo, and protected them from responsibility for any irregularity or delay in the shipment. Both these cases are distinguishable from that before us, although they both recognize the legality of

of such instructions of a liability that would otherwise attach without restraint. But the latest case brought to our notice—*Bannister v. Bresslauer*, et al., appears to me in principle to govern this: There by a charter party made between the plaintiff, the shipowner and the defendants, the cargo was to be loaded and discharged with all dispatch, and freight to be paid in cash on unloading and right delivery; “the charterers liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge; the captain having an absolute lien on it for freight, dead freight and demurrage, which he or owner shall be bound to exercise.” The action was brought by the shipowner against the charterers for delay in loading the vessel at *London*, her port of loading, for a voyage to *Antwerp*. It was held that a plea setting out the above condition, with an averment that the cargo was shipped, and that the same was worth the said freight on arrival at the port of discharge, and that thereupon the defendants liability as charterers upon and under the charter party ceased, “was a good answer to the action.”

The counsel who argued in support of the demurrer endeavored, but without avail, to distinguish the case in principle from that, viz., the intent of the parties, which was held to rule the two former cases. The opposite counsel who argued said, “the intention of the parties in inserting these clauses is to put the whole settlement of the shipowner’s claim for freight, dead freight and demurrage, upon the consignee of the goods, who, in all probability, is in most, if not in all cases, the principal of the charterers.” This, he added, “is manifest from the proviso that the assertion of the lien shall be obligatory on the captain or owner.” Some such intention must, I think, have been in the mind of this defendant when he chartered. If he had been alone to his own interest he would have qualified the condition in question here as the defendants did in *Bannister v. Bresslauer*, viz., by a proviso ‘that the cargo at the port of delivery shall prove to be worth the freight,’ and also by an obligation on the master to assert the lien there. In *Bannister v. Bresslauer*, *Byles*, J., in referring to *Ogleby v. Yglesias*, and *Milvain v. Page*, said, “Those cases show that the giving a lien on the

cargo, and discharging the charterer from all responsibility in respect of the goods, is not unusual." The learned Judge added, as I may say here, "In construing this stipulation therefore, according to the literal sense of the words, we shall not be introducing anything contrary to the custom of merchants."

FOSTER v. FOSTER.

Action of ejectment for an undivided moiety of certain lands, defendant being legally entitled to the other half, but claiming the whole, and having actually ousted plaintiff therefrom.

The jury found for the plaintiff, on certain questions of fact submitted to them, their answers constituting a complete case for him, and entitling him to a verdict, but seven of them not being able to concur in a general verdict, after four hours deliberation the Court ordered that a verdict be entered that the plaintiff was entitled to the possession of one-half of the said lands.

Held dubitante, that the verdict for plaintiff should be upheld.

YOUNG, C. J., now, (February 24th, 1873,) delivered judgment as follows :

This is an action of ejectment for the undivided half of a lot of land, with mills and mill privileges, at *Bridgetown*, and is an offshoot or branch of the famous controversy between *Foster* and *Fowler*, which has been so often before this Court. The defendant is entitled to the other half, but claiming the whole, put in the usual plea denying the plaintiff's title, and then a second plea of tenancy in common, admitting the plaintiff's right to an undivided share. It would seem from this that the defendant was by no means confident of sustaining his title to the whole, but his claim thereto and an actual ouster was clearly shown.

The plaintiff and his brother *Oliver*, under whom the defendant holds, were joint devisees of the property under the will of their father, *Asa Foster*, which was proved in the year 1854. There was an old mill, which *William* rented to *Oliver*, the latter built a new mill in 1858 or 1859, to which *William* made some contributions. The dispute then arose with *Fowler*, and *William* executed a deed of his half in 1859 to *Oliver*, made, as he says, in order to defeat any judgment that might be obtained against him by *Fowler*. The completion

and delivery of this deed was the main question at the trial. *Oliver* was examined under commission, and both brothers united in repudiating the deed. *William* testifies that *Oliver* was not present at the execution, and knew nothing of it, that he handed the deed for the above purpose to the late *Mr. Troop*, who was to return it to him if nothing happened about the *Fowler* business. He is contradicted on this by some declarations of his own, which he explained or deavored to explain away, and by the evidence of *Mr. Jacob Troop*, and the Judge left the following questions to the jury, " Was the deed from plaintiff to *Oliver Foster*, at the time of the transaction respecting it, which took place in *Mr. Troop's* office, and when it was handed to the late *Mr. Troop*, intended by the plaintiff to take immediate effect as a deed then conveying title to *Oliver Foster*, or was it at that time intended by the plaintiff to take effect as a deed conveying title to *Oliver* only, in case the contingency stated by the plaintiff should happen." To which the answer of the jury was that it was not intended to take effect as a deed at that time.

This is not the case therefore of a plaintiff seeking to set aside a fraudulent deed, thereby taking advantage of his own wrong, but of a party questioning the due execution and delivery of the deed, which it was the province of the jury to pass upon, and we can scarcely be surprised at their decision, when it was clear that the consideration was inserted by the attorney without any money having passed, and that the deed lay neglected and unrecorded till after action brought. In the deed, too, from *Oliver* to the defendant he professed to convey only his own right under his father's will, and his testimony on that point is confirmed by the terms of the conveyance. On the merits of the case, therefore, and the finding of the jury, but little, I think, could be said.

Two points, however, were made at the argument which require our consideration. The commission was taken out by the plaintiff in the usual form and with the usual instructions to a lawyer in *Ontario*, and was returned 27th *September*, 1872, only five days before the trial, so that the second section of the Evidence Act, chap. 135, could not operate, though the tenth section does. Objections to the execution and return were taken at the trial and one or two others at the argument.

which do not appear to me to be fatal. The fact of the plaintiff's transmitting the return amounts to nothing, when the seals were unbroken—there was no swearing of a clerk, because no clerk was employed. The second examination of the witness on the 6th *September* was of no consequence at the trial, and the want of a formal return on the commission when all the proceedings were in due order, is not an objection which ought to prevail under the 10 section of the Act.

Besides the foregoing question, the Judge put another to the jury as to a demand of possession by the plaintiff from the defendant, and his denying the plaintiff's title, which the jury answered in the affirmative, the two answers constituting a complete case for the plaintiff, and entitling him to a verdict, but the report states "that seven of the jury not being able to concur in finding a general verdict after four hours deliberation, the Court orders that a verdict be entered that the plaintiff is entitled to the possession of one-half of the said mill and land claimed by him." Now the question is can this be legally done. In the present term our attention has been called in another case to the circumstances under which an omission or a mistake in a verdict can be supplied or connected, and the two cases have rendered it necessary to look carefully into the practice.

It appears from *Tidd*, 9th ed., 900, and *Archbold*, 12th ed., 7, 447 and 466, that the mode of taking verdicts in civil suits in *England* is different from ours. The associate in each Court is an officer appointed by the Chief Justice and Chief Baron respectively, who is paid a salary in lieu of fees, and cannot act as barrister or attorney. A general verdict is given by the jury on the several issues, *viva voce*, as criminal verdicts are given with us. The panel is not signed by the foreman, but the associate makes a minute of the verdict, from which minute an indorsement is made at *nisi prius* on the record, and is called *postea*. The duty of the attorney of the successful party in dealing with the *postea* is pointed out in the books. The associate in general indorses the *postea*, but sometimes he leaves it to the attorney of the successful party to do. Having no skilled officer similar to the associate, we authenticate the verdict by the signature of the foreman on the panel, but by what authority or rule this convenient

practice crept in, I am not aware. There is certainly no rule making the signature of the foreman essential to the validity of a verdict.

The subject of the conduct and amendment of verdicts, belongs more to the other case I have referred to, than to the present. I shall content myself, therefore, with a reference to the cases in *Archbold*, 462-3; *Fisher*, 138-9; *Digests for 1870-1*, fol. 7, where the various grounds and reasons of such amendments, which have sometimes been carried to a considerable length, are stated. Where a mistake is spoken of in recording the verdict, it means a mistake in the associate taking the minute, or the entry by himself or the attorney on the *nisi prius* record, and the *postea* may be amended by the Judges' notes, or the notes of the Clerk of Assize, or associate. If there are several counts in a declaration, some of which are bad, and by mistake a general verdict is entered on all the counts, although evidence was given on the good only, the *postea* may be amended by the Judges' notes. 1 *Doug.*, 576; where there is a misjoinder of counts, and a general verdict given, if the jury have calculated their damages on one count only, the *postea* may be amended by entering the verdict on that count, by which means the misjoinder will be cured; 1 *Chitty*, 626. But in one or two cases the Court have gone farther in dealing with the verdicts of juries. In *Ernst v. Brown*, 4 Bing, 162, the difficulty arose from the state of the record not corresponding with the intention of the jury. It is manifest, said *Parke*, J., that the verdict in its present shape was a mere slip, unless it is to be supposed that the jury were either foolish or mad, and the Court thought the verdict should be amended. In *Newton v. Harland*, 1 M. & G., 671, 728, the Judge at first refused to interfere with the verdict returned, but afterwards directed the entry of the verdict to be altered by the associate. In *Baker v. Lawrence*, 22 L. T. R., N. S., 608, a general verdict was returned for defendant. It was entered by order of the Judge by mistake for the plaintiff. After the jury had been discharged they were recalled, the Judge recollected what their verdict was, and from their statement found that a mistake had been made. He then directed the *postea* to be amended, which the Court upheld.

In *Treise v. Thompson*, 1 Taunt., 12, *Heath*, J. cited a case of trespass where no evidence having been given of the precise amount of the injury sustained, the jury refused to give any damage, and on application, the Court ordered a verdict to be entered for the plaintiff with one penny damages, on which *Mansfield*, J. remarked, that the case was rightly decided, and that the Court might follow the precedent it had established.

The case, however, which approaches most nearly to the present is that of *Doe. d. Lewis v. Baster*, 5 Ad. & Ell., 129; there the jury having found the fact, which, as the Chief Justice instructed them, entitled the plaintiff to a verdict, the associate, after his lordship had retired, told them that this was a verdict for the plaintiff, and entered it accordingly; upon which several of the jury expressed to him their dissent, and declared that they had not agreed to find for the plaintiff, the case, as here, being ejectment. On a rule to set the verdict aside, Lord *Denman* said the associate would have done wrong if he had not entered a verdict for the plaintiff. They were unwilling to find a forfeiture and the case was a hard one. They were bound, however, to re-consider their verdict, and if they had then found for the defendant their verdict would have been against the evidence. The verdict, as entered, was therefore upheld, and on the authority of this case, though with some hesitation, I think that our judgment should be for the plaintiff.

MCNEIL v. MOREHOUSE.

AN appeal being taken from a Magistrate's decision, the defendant and one W., an attorney of the Supreme Court, becomes sureties on the appeal bond. On the ground of W. being a surety the bond was held irregular and the appeal dismissed by the Supreme Court. Plaintiff then resorted to his original judgment, and the execution being returned unsatisfied, sued defendant on the bond.

Held, that he could not recover, as by the course he had taken he had waived all right or claim against defendant under the appeal bond.

Donn, J., now, (February 24th, 1873,) delivered judgment as follows:

This was a special case agreed upon between the parties in the cause, their counsel and attorneys. The defendant was

a co-surety with *Wade*, an attorney of this Court, in an appeal bond in a suit between the plaintiff in this cause and one *Trefoy*, tried before a Justice of the Peace in the County of *Digby*. The appeal being entered in the following term of the Supreme Court at *Digby*, the plaintiff objected to the trial of the cause and moved that the appeal should be dismissed, on the ground that the bond was irregular because *Wade*, the co-surety was an attorney of this Court. The Chief Justice, who presided at the Court, taking that view of the case, declined to hear it, and dismissed the appeal. The plaintiff then resorted to his judgment before the Justice and issued an execution on it, but it was returned not satisfied. An action was then brought on the appeal bond against the present defendant, and it was turned into the special case we are now considering. The counsel for the plaintiff, in support of his case, referred us to *Chitty's Practice*, 831, but on reference to the authority it will be found that it does not extend to this country, being a rule of *H. T.*, 1853, and that if it did extend, it has no application to the case under consideration. In my opinion the plaintiff made his election when he moved the Court to dismiss the appeal and went back to his judgment before the magistrate, and could not afterwards proceed against the bail. There was not anything to prevent him, after the cause was entered in the Supreme Court, to proceed with the trial, and had he in that case obtained a judgment against *Trefoy*, he could have made the bail liable, but it would be most unreasonable to make the defendant in this cause responsible upon his appeal bond; after the plaintiff refused to have his cause tried when it was entered in the Supreme Court, according to the condition of the bond. A creditor who obtains a verdict before commission against a bankrupt, is entitled to prove his costs as well as his debt under the commission, though judgment was not signed until after commission was issued, and having proved his debt and acted under the commission, has made his election, and shall not afterwards resort to the bankrupt bail. 2 *H. Black*, 1317. And in the present case the plaintiff has made his election, he refused *Trefoy* the right to try his cause in the Supreme Court, because the bond signed by the defendant was also signed by an attorney of this Court and had the appeal dismissed, and

then resorted back to his judgment before the Justice of the Peace, and thereby in my opinion waived all right or claim under the appeal bond against the defendant. I therefore think judgment should be entered for the defendant with costs.

PAINT v. MACLEAN.

PLAINTIFF claimed damages for slander, alleging in his declaration that defendant had spoken certain words about him in relation to his business, to the effect that he was guilty of fraudulent conduct in said business, and was untrustworthy and unprincipled in his way of carrying it on, whereby plaintiff was injured in his credit and reputation, and his customers were caused to limit their dealings with him, and to withhold business from him.

Held, that there was no need of alleging or proving special damage.

RITCHIE, J., now, (February 24th, 1873,) delivered the judgment of the Court :

We are all of opinion that there are two counts in the declaration in this case, and not but one as contended for on the part of the plaintiff. The first of these is unquestionably bad, as the words alleged to have been spoken not being actionable in themselves, are not stated to have been spoken of the plaintiff in respect of his trade or business, and no special damage is alleged. The second count is good, the words there are stated to have been spoken of the plaintiff in relation to his business as a general commission merchant, and are calculated to injure him in it, and the meaning given to them is, that he had cheated and was guilty of fraudulent conduct in his said business, and was untrustworthy and unprincipled in his manner of carrying it on, whereby he was injured in his credit and reputation as a general commission merchant and in his said business, and that *Levi Hart* and many persons who had heretofore dealt with him, limited such dealings and withheld business from him.

There are no grounds whatever for the contention of the defendant's counsel, that special damage must be alleged and proved, where words though otherwise not actionable in themselves, are stated to have been used in relation to a man in his profession or business, and his reference to *Selwyn's N. P.* in no way qualifies such an inference, but if that had been

the law there is a sufficient statement of special damage in this count. Where the words are not actionable in themselves special damage is considered the gist of the action, not so when words are spoken of a man in way of his trade or calling, when they *are* actionable in themselves, which means without the necessity of alleging special damage or proving it. If the plaintiff has sustained special damage for words actionable in themselves, and he seeks compensation for it, such special damage should be stated in the declaration with as much certainty as the subject matter is capable of, so that the defendant may be prepared to meet it, but in *Evans v. Harris*, 1 H. & N., 251, it was held to be sufficient to allege and prove a general loss of customers as special damage, without stating their names. The judgment of the Court, therefore, is for the defendant on the first count and for the plaintiff on the second.

SMITH v. McNEIL

DEFENDANT, one of the sureties on an appeal bond, which became forfeited, resisted payment on the ground that when he signed the bond he did not know who his co-surety was to be.

Held, that in the absence of fraud this was no defence.

DODD, J., now, (February 24th, 1873,) delivered judgment as follows:

We have no difficulty in this case. Here the plaintiff became a co-surety with the defendant upon an appeal bond in the cause of *Mitchell v. McDonald*. It was first signed by the defendant and *McDonald*, and when taken to a Justice of the Peace he objected to it because it had not the name of a second surety on it, and then *McDonald* took it to the plaintiff and he signed the bond in a blank that had been left for a second name, and afterwards told the plaintiff he was pleased he had signed it, as it divided the responsibility between them. Afterwards the bond became forfeited, and the plaintiff was compelled to pay the full amount of the bond. The present suit is against the defendant for a moiety of the sum so paid by the plaintiff. The defence at the trial, as contended by the defendant, was that he was not liable, as when he signed the

bond he did not know who his co-surety was to be. The case agreed upon between the parties in this cause and submitted for the opinion of this Court contains the facts I have mentioned, and I do not find it necessary to refer to any authority for our judgment, as no authority was cited at the argument of the cause to shew that a bond like that under consideration must be signed by all the parties to it at the same time, unless there is fraud charged and proved. We therefore think that judgment should be entered for the plaintiff, with costs for the amount proved at the trial before the Court at *Pictou* in *June* term, last.

THEDIBEAU v. EVERETT.

DURING a recess which occurred in the progress of a trial, after all the evidence had been put in, but the closing addresses of the counsel not yet delivered, one of the jurors was heard to say aloud : "The plaintiff has got to get his pay and he will get it." The verdict being in favour of plaintiff it was sought to be set aside for misconduct on the part of a juror.

Held, that looking at the circumstances under which the remarks was made, there was no ground for disturbing the verdict.

WILKING, J., now, (February 24th, 1873,) delivered the judgment of the Court as follows :

The verdict given for the plaintiff in this cause is sought to be set aside on the ground of misconduct on the part of one of the jurors who gave it, and if the facts be such as lead our minds to doubt that the functions of the jury were performed with purity, integrity and the absence of corrupt bias the verdict must not be permitted to stand. On the other hand, especially where, as in this case, no dissatisfaction with the verdict is expressed by the learned Judge who presided at the trial, we owe it to the party in whose favor the verdict has been given not to interfere with his rights by disturbing it if reasonable ground for concluding that it embodies in any degree the result of corrupt influences in that moral agency which produced it does not necessarily arise from the evidence before us. That it does not appear is the conclusion at which we have arrived. We learn from the affidavit of *Mr. Savary* that when the words were used by the particular juror which have given occasion to the rule all the evidence in the cause had

been heard by him, although the closing addresses of the counsel and the charge of the Judge had not been delivered. The deponents *Amireau* and *Melancon*, on whose affidavits the rule was granted, do not concur as to the precise language used by the juror, which was uttered during a recess and in the neighbourhood of *Clair Court House*, but their statements are substantially to the effect that *Belliveau*, the juror, in the presence of a dozen persons, a circumstance not calculated in itself to produce in our minds an impression of corruption on the part of the juror, on doubts being expressed by deponents or others present as to what the verdict would be, said: "The plaintiff has got to get his pay and he will get it." This language, fairly and reasonably construed, imports no more than an opinion or a conviction in the mind of the man who used it that such ought to be, perhaps that it would be, the result of the trial. To have uttered that opinion under the circumstances of his then position was indiscreet and improper, but not criminal. Moreover, it is fair and just to the juror thus impugned to consider that if he had then contemplated using afterwards in the jurors withdrawing room any corrupt means of influencing his fellow-jurors, it is not probable that he would have thus publicly and gratuitously avowed his opinion as to the result of the trial. Men of ordinary prudence, if so pre-determined, would have been reticent under the circumstances. Looking to the affidavit of the juryman, he exculpates himself from every ground of crimination, and shews that with the exception of expressing an opinion that the plaintiff would succeed in the suit—an opinion expressed by him after he had heard *Amireau* and *Melancon* state their opinions strongly in favor of the defendant, he was not open to censure for anything save imprudence and levity which, though improper and unbecoming in his position, are not enough to make it our duty to set aside the verdict. The rule, therefore, must be discharged with costs.

MCGILLVIRAY v. McDONALD.

DEFENDANT having been summoned for selling intoxicating liquors without license, made a written confession, upon which the justices inflicted a penalty upon him as for a fourth offence. Defendant was not present at the trial, nor was any intimation given him of any intention to proceed against him, except as for a first offence. The original convictions in the three previous actions against the defendant were produced and read at the trial, but no other evidence was offered.

Held on certiorari, that the conviction should be quashed.

RITCHIE, J., now, (February 24th, 1873,) delivered the judgment of the Court:

It appears by the papers brought up by *certiorari* that a summons in the form given in chapter 2 of the Acts of 1869, was taken out against the defendant at the instance of *Alexander McGillviray*, Clerk of the License for the district of *Antigonish*, for a violation of the law relating to the sale of intoxicating liquors. The summons was taken out on the 17th *February*, 1870, returnable on the 7th *March*, and on the 21st *February* the defendant, by a writing under his hand, confessed having sold intoxicating liquors contrary to law within six months previous to the issue of the summons.

On the 7th *March* judgment was given, and the conviction was in the following form: "The within defendant having been duly summoned, as mentioned in the annexed writ of summons, was this day convicted of the offence of violating the License Laws by selling intoxicating liquors without license, on his own confession. We therefore fine him \$80, being the fourth offence, or three months' imprisonment, with \$1.05 costs, amounting in all to \$81.05, to be paid forthwith."

The defendant does not appear to have been present at the trial, and no intimation was given him of any intention to proceed against him for any other than a first offence.

It appears from the affidavit of one of the justices who tried the case, that in addition to the defendant's confession, the original convictions against the defendant of three different violations of the laws relating to the sale of intoxicating liquors, each signed by two justices of the peace of the said county, one of whom was a justice who signed the present conviction, were produced before giving judgment and signing this conviction.

By the act above mentioned is declared that the first offence shall mean the first time the accused party shall have paid a fine or suffered imprisonment, whether upon confession or conviction; and by the 19th chapter of the *Revised Statutes*, of which this act is an amendment, it is required that the names of the witnesses who may have been examined shall be inserted in the conviction, as well as a statement of the manner of the party's conviction.

As in this case it appears upon the face of the conviction that the only evidence before the justices was the confession of the defendant of having sold intoxicating liquors contrary to the law, which would only justify the imposition of a penalty of \$10 or 20 days' imprisonment, this conviction should be quashed.

Even if we could go out of the conviction and receive the affidavit of one of the justices who tried the cause as to what evidence was given at the trial, it appears to me that more proof would have been required to justify the conviction for a fourth offence than was, according to his statement, produced. It should, I think, have been shewn that the fines imposed in the preceding cases had been paid or the imprisonment suffered

Why the act required that previous penalties should have been actually paid or imprisonment suffered before the additional penalty as for a second or subsequent offence should be imposed, it is not easy to understand. It certainly, without any apparent cause, throws a difficulty in the way of inflicting punishment for repeated violations of the law.

It is not necessary to decide in this case whether there should not be some intimation given to the defendant in the summons or otherwise, when there is an intention to proceed against him for a second or subsequent offence, as would certainly be required if a party were indicted in this Court in a case where the punishment is increased for a second offence; and especially would some such notice seem called for where the party had previously confessed the offence with which he was charged, and might not on that account think it necessary to be present on the trial.

CAMPBELL v. MCKINNON.

ACTION for trespass involving title to land, the sole question between the parties being as to the division line that separated their respective lots.

The verdict being for plaintiff, a rule was taken out under the Statute to set it aside, but on argument,

Held, that the verdict ought not to be disturbed.

DESBARRES, J. now, (February 24th, 1873,) delivered the judgment of the Court:

This was an action brought against defendant for wrongfully entering on plaintiff's land, and cutting down, and taking away, and converting to his own use, a quantity of trees therefrom. The case was tried before Mr. Justice *Dodd*, at *Antigonish*, and a verdict found for plaintiff for \$5 damages, and there was a rule taken under the statute to set it aside, which was lately argued before Mr. Justice *Dodd*, Mr. Justice *Ritchie*, and myself. We all took the same view of the case at the argument that we do now, but we thought it proper to reserve our judgment, that we might carefully examine the evidence and satisfy our minds whether our first impressions were right.

The plaintiff and defendant are adjoining owners of lands included in what is called the *Bradshaw* Grant, which is divided into lots, and has passed into the hands of different persons. The plaintiff claims the land in dispute under his father's will, who died in 1868, having held up to that time under a deed from the administrators of *Bradshaw*, dated 21st *June*, 1823, and the sole question between them is as to the line of division or boundary of the two lots, the plaintiff contending that the true line is one running westwardly from a stake and stones at the north-east corner of one of *Duncan Chisholm's* lots on the spot on which a maple tree stood, which many years ago was marked as a corner of that lot; the defendant contending that it is to run from the stake and stones westwardly to what is called *Carter's* corner at the western end or rear of the lots. It appears from surveys made by *Lowden*, a surveyor, in 1871 and 1872, that a line running from the stake and stones westwardly on the proper course will not strike *Carter's* corner but will strike a fence

on the western side of the road which was built and upheld by plaintiff's father for a period of upwards of thirty years before his death, as a fence standing on the true line. In running this line *Lowden* says he found old blazes on trees which he described of the age of over forty-five years, thereby establishing the important fact that a line had been run at that time corresponding with the line he ran, which he said was a good line for the grant commencing at the stake and stones pointed out to him by *Duncan Chisholm*; that when he came to the road the flag was placed at the end of a log fence on the western side of the road, and as long as the fence was straight it corresponded with his line; there was a clearing on the west end of the log fence; that in January he ran some of the eastern lines of lands in the neighbourhood of the *Bradshaw* lands and found they were identified with the course he ran for the plaintiff. In his cross-examination he stated that he knew *Carter's* corner. *Henry Carter* was on one side of the corner and *John McKinnon* on the other; that some years before that he ran the lines between them, but it had nothing to do with plaintiff's corner. The log fence extended from fifteen to twenty rods.

Duncan Chisholm, another witness, stated that he was the owner of the land marked on the plan in his name and had resided on it thirty-four years,—purchased it from *John Siggins*, and the lot to the north of it from *James Bradshaw*; that when he purchased from *Siggins*, he (*Siggins*) was then residing on the land, and *Murdoch Campbell*, the father of plaintiff, had the land to the north. When he purchased from *Bradshaw* there was a line dividing his lands from *Siggins'*—a well defined line, which is the line by which the plaintiff claims. The corner at the north-east was then a maple tree, shewn to him by *Siggins* and *Harrington*, the surveyor. *Harrington* was there to measure the lot before him. He commenced at the south-east corner, then marked by a hemlock, and ran to the maple at the north-east corner, then westerly to divide the lots to the road; there was then a marked line to divide them. Where the maple stood he put a stake and stones after the maple fell, and pointed out the stake and stones to *Lowden* when he made the survey in 1871, and followed him in the survey, which corresponded with

Harrington's. He had known the fence on the western side of the road for over thirty years on the same spot, and it was in a line with the surveys of *Harrington* and *Lowden*. In his cross-examination he says he was with the defendant when he staked out the line from *Carter's* corner, but he did not go near the old line. The plaintiff was with him, and afterwards they got a surveyor to see if the old line would go to *Carter's* corner, but he did not go near the old line. The plaintiff was with him and they afterwards got a surveyor to see if the old line would go to *Carter's*, but it would not, and they did not agree on any thing.

James Grant, another witness, recollected being on the west end of the fence with his father twenty-eight years ago, when *Walter Siggins* (who was then residing on defendant's lot) came up to them. There had been a heavy gale which had blown down the trees and a fire had run through them. *Siggins* told his father that he would let him have a piece of land to plant potatoes there if he would clear it; that he and his father afterwards went there to clear the land, and *Siggins* then showed them the line between himself and *Murdoch Campbell*, and told them to build a fence at the west end of and in a line with the fence then built there by *Murdoch Campbell*, as it would stand as part of the line fence, having as much of it to build as *Campbell* had.

Mary Campbell, the mother of the plaintiff, the plaintiff himself, and other persons, were also examined as witnesses on the part of the plaintiff; but it would be a waste of time in the view which my learned brethren and myself take of this case, to repeat their testimony; nor is it necessary to refer to the testimony on the part of the defence. It is enough to say that the whole of the evidence on both sides has been very carefully and fully considered, and that we are all of opinion that the verdict in this case ought not to be disturbed.

It was contended at the argument by *Mr. Henry* that there was evidence of a conventional line which ought to have been submitted for the consideration of the jury by the learned Judge who tried the case; but we are all of opinion that the evidence produced was not sufficient to warrant the jury in finding a verdict for defendant on that ground, and that if such a verdict had been found it could

not have been sustained. *McDonald*, the surveyor who ran the line to which defendant claims, and *Duncan Chisholm*, both state that the plaintiff did not assent to it, and there can be no doubt that the evidence in this case falls short of what has always been considered essential to the establishment of a conventional line,—the mutual consent of the parties on the ground. The rule for a new trial must therefore be discharged with costs.

DODGE v. THE HALIFAX GAS COMPANY.

THE occupants of a factory and an adjoining house had the defendants put gas into both, and in order to do so it was necessary to have a branch pipe from the company's main down a private lane leading to the buildings. The only stop-cock between the main and the buildings was at the street. The buildings becoming vacant, the company removed their meters, turned off the gas, and carefully closed up all the pipes. Subsequently plaintiff purchased the premises, and at his request defendants turned on the gas again. While the house had been vacant the pipe in one of the rooms had been cut or wrenched off by some unknown person, and left open, so that when the gas was put on it had access into the building, and coming in contact with a light, an explosion occurred, damaging the building, and for this plaintiff brought his action. The state of the pipe was known four hours before the explosion to the wife of the occupier of the house. The defendant company had nothing to do with the fittings inside the buildings, as they belonged to the occupier, and their only duty was to see that the pipes were properly secured when the meters were taken away, and this they had done. The learned Judge instructed the jury that the plaintiff was not entitled under the evidence to recover, but they found a verdict for him nevertheless.

Held, that the verdict should be set aside.

RITCHIE, E. J., now, (March 10th, 1873), delivered the judgment of the Court:

This action was brought by *John H. Dodge* against the *Halifax Gas Company*, for damages sustained by him from an explosion of gas, which took place in a building belonging to him, but, at the time of the explosion, in the possession of a tenant.

It appears from the evidence, that *Wm. L. Dodge & Co.*, being the occupants of a factory and of the building in which the explosion subsequently occurred, and which was used by them as an office in connection with the factory, applied to the Gas Company to have gas put into the factory and office, and a pipe was accordingly laid from the company's main pipe in Pleasant Street down a private lane leading to the factory, from which a branch pipe led to the office, and thus gas was introduced into both buildings.

The plaintiff was the brother of *Wm. L. Dodge*, and for three years, while the buildings were so lighted, was the foreman of the firm, and continued such until its failure, in *February*, 1871, and in *June* of that year he purchased the property, and subsequently becoming desirous of having gas again in the factory, (the office in the meantime having been leased, with the adjoining house, to a tenant, *Mr. Tremain*), he applied to the company for its introduction, and on the 2nd of October, 1871. it was introduced from the main pipe in Pleasant Street into the branch pipe leading to the factory in the same way as on the former occasion. The only stop-cock between the main pipe and the buildings in question was at the street, and the gas thus introduced passed into the factory and also into the building which had formerly been used as an office, the pipe which led into the office not being closed, it escaped into that building, which caused the explosion complained of.

The Gas Company, it appears from the evidence, have nothing to do with the gas pipes within buildings, these are furnished and put in by gas-fitters at the expense of the occupant, and for him. The Gas Company put a stop-cock on at the street, and, in this case, the whole of the pipes inside this stop-cock belonged to the occupant or proprietor of the premises; the stop-cocks between the service pipe and the meters belong to and are put up by him, and half of the coupling belongs to the company and half to him. There was originally a meter in the factory and also one in the office.

After the failure of *Dodge and Company* in *February*, 1871, the two meters were removed by the company, and the pipes in the office were then carefully closed by them; the men who were employed for that purpose by the company say that the gas was turned off, the meters removed and the pipes secured; that one of them uncoupled on the outside of the stop-cock, connected the coupling with the stop-cock, then tightened the jam of the key in order that the cock could not be turned by the hand, and bent the pipe down to the floor so that gas could not afterwards escape. After the failure of *Dodge and Company*, the fittings had been sold as assets of the firm, and had been taken away, and it appears

that at some time, when, or how, or by whom, is not in evidence, the pipe in the office had been cut or wrenched off fifteen or eighteen inches from the floor and left open, so that, when the gas was allowed to enter the pipe in the lane, it had access into the building through the open pipe.

The learned Judge who tried the cause told the jury that, in his opinion, the plaintiff was not entitled, under the evidence, to recover. They nevertheless found a verdict for him.

On the argument of the rule to set aside this verdict it was contended, not only that there was no evidence of failure of duty or negligence on the part of defendants to render them liable in this action, but that there was such contributory negligence on the part of the plaintiff as would, on that account, preclude him from a right to recover.

That which first presents itself for our consideration is, whether there has been any negligence or dereliction of duty on the part of the Gas Company to render them liable in this action? It was the duty of the company when the meter was taken away, on the failure of *Dodge and Company*, to see that the pipes were properly closed. This duty their servants carefully performed, and but for the act of some third person in cutting or breaking the pipes, they would have remained properly closed. For that person's act the company can be in no way responsible, nor could the company have any right of action against him, as the pipe did not belong to nor was it in the possession of the company. The act thus committed was a trespass against the owner or occupier of the building, for which he could maintain an action, and when the plaintiff applied for gas for the factory the company would have every right to suppose that the pipes remained as they had left them, and they might reasonably infer that the plaintiff would occupy the office in connection with the factory as *Wm. L. Dodge and Company* had done. The company having performed their duty in closing and securing the pipes when the meters were taken away, it became the duty of the proprietor or his tenants to see that they were kept closed and to repair any damage done to them, which might lead to injury from the escape of gas.

It was urged upon us on the part of the plaintiff, that gas was in its nature so dangerous from its liability to

explosion, that extra care was required from the defendants. It is quite true that caution and care are called for in the use of explosive and dangerous substances, yet all that is required is that the party using them should carefully perform all the duties imposed on him by law, and the argument would have had weight here if the accident could be attributed to the want of due care in closing the pipes, and if nothing had been shown to have been done to them from the time they were closed till the gas was again introduced it might not unreasonably have been inferred that due care had not been used by the servants of the company. But none of the authorities referred to show that when a person has performed his duty with respect to dangerous or explosive substances with due care and caution, he is to be held liable for the improper act of a third person, over whom he has no control. *Addison on Wrongs*, 244, much relied on, bears on the point, but, it appears to me, not very favorably to the plaintiff's case. That author says: "Whoever introduces powder or explosive material into a building is responsible for the damage occasioned by it," and then he goes on to say on whom the care and caution specially devolve: "every tenant is responsible for not taking care that the stop-cocks for regulating the supply of gas to a house are properly turned, and if the stop-cocks are negligently left open by the tenant or his servants when the gas lights are burning and an explosion occurs and injures the house, the tenant will be responsible for the injury; but if a thief enters the house in the absence of the tenant and cuts or carries away a gas pipe, the tenant is not responsible for the damage;" *a fortiori* would the company not be responsible, as contended for in this case. He goes on to say: "When the entry of the gas into a house is under the control of the occupant of the house, the company who supply the gas are not bound, on receiving notice that no more gas will be required, to stop the supply from the outside by putting an outer stop-cock or cutting off the communication between the gas pipes in the interior of the house and the main in the street," a direct authority in support of the defendants' contention.

Nor does *Mose v. Hastings and St. Leonards Gas Company*, *Fisher's Digest*, 4192, cited on the part of the plaintiff.

support his view. There the defendants were held liable for damage occasioned by defects *in their own mains and pipes*, which they knew of or, from the evidence afforded by the smell of gas, they ought to have been aware of by proper inspection, but there is nothing in the case to lead to the conclusion that any such liability was imposed on them with reference to the pipes within the building belonging to the owner, and the inference is the other way; but *Holden v. Liverpool New Gas and Coke Company*, 3 C. B., 1., cited by the defendant's counsel, seems to me to have a direct bearing on all the questions involved in the case before us; gas there found its way into the house in a similar manner, the cause of the accident was the same, and the question as to the respective duties of the tenant and the Gas Company in the protection of the house by keeping the gas pipes closed, came under consideration:—The Gas Company had for some time supplied gas to a house belonging to plaintiff, the only means of shutting it off being by a stop-cock within the house, the key of which was kept by the occupant, the last tenant on quitting gave notice to the company that he should not require any further supply, and one of the workmen at his request removed a chandelier from one of the rooms, leaving the end of the pipe properly secured; the internal fittings were the property of plaintiff, while the house remained untenanted the gas by some unexplained means escaped and an explosion took place, by which the house was considerably damaged. On examination of the premises after the explosion, it appeared that the gas was turned on, and that the internal supply pipes had been torn or cut off from the meter and carried away. There was no evidence to show how this occurred, but it was assumed to have been done by some person who had feloniously entered the house after the last tenant had quitted it. On case against the company alleging a breach of duty on their part *in not taking proper means to prevent the influx of gas in the house*, the Judge directed a non-suit: it was contended that it was the duty of the company upon the receipt of a notice from the tenant that he no longer required gas, *to take effective means to prevent its entering the house*, and the argument of counsel was identical with that offered to us, that the defendant had no right, by the unauthorized introduction of

the gas into plaintiff's house, to impose upon him the exercise of any degree of care, and as for the purposes of prevention it was essential there should be a stop-cock outside the house, they were bound by law to provide it. The learned Judge considered that no such duty was cast on the defendant, but that it was the duty of the landlord, or of the outgoing tenant who had the means of controlling the influx of gas by the internal stop-cock, to see that it was turned off. "I have always," observed the learned Judge, "understood it to be a principle applicable to actions for negligence, that there should be no negligence or want of reasonable caution on the part of the plaintiff. In this case the tenant of the house must, for this purpose, be identified with the plaintiff, who must be responsible for not taking care that the stop-cock inside was properly turned." The Court concurred in the view taken by the learned Judge, and refused to disturb the non-suit. I have been led to refer the more at length to this case on account of its close resemblance in all its particulars to that before us, and it is an authority which, it appears to me, must govern us in our decision. Even adopting the view of the plaintiff as regards a dereliction of duty on the part of the defendants, it can hardly be contended, I think, that there has not been contributory negligence on the part of the plaintiff or his tenant,—and it is immaterial to the defendant which of them,—which would debar him from recovering. The pipes had been cut or broken off when under the care of one or other of them, or, as in the case just referred to, by some trespasser when the house was vacant. The state of the pipes was known before the accident, to *Mrs. Tremain*, the wife of the tenant, who himself was absent. On the day of the accident, four hours before it occurred, she perceived a strong smell of gas from this room which was unoccupied and closed, and before she entered she knew that gas proceeded from the closet where the meter had been, yet, she and the plaintiff open the room and bring the escaped gas in contact with the light in the hall, which adjoins it, and an explosion ensues. Can it be said that there has not been want of due care on the part of the proprietor or occupant of the house, which contributed to the misfortune? I concur in the view

taken by the learned Judge at the trial, and am of opinion that the evidence did not justify a verdict for the plaintiff, and that it should be set aside.

UNION MARINE INSURANCE CO. v. METZLER.

DEFENDANT was agent for the owners of a vessel, and acting as such had her insured with plaintiffs in the sum of \$800. On the vessel being lost the plaintiffs paid him the full amount, and then subsequently discovered that the policy had been void on the ground of over-insurance, the vessel being valued at \$4,000 only, while she was insured in two other companies for \$6,200 prior to being insured with plaintiffs, of which fact they had no knowledge when they insured her. When this became known to them they sought to recover back the amount paid defendant. The defendant had not been aware of the over-insurance, and had acted in perfect good-faith. Soon after receipt of the money, and before notice from plaintiffs, he had accounted with his principals for the full amount in a settlement between them.

Held, that the defendant could not be compelled to refund the amount.

DESBARRES, J., now, (March 10th, 1873,) delivered the judgment of the Court as follows:

This was an action brought to recover back the sum of \$800 paid by the plaintiffs to the defendant, in whose name some insurance was effected for that amount on the schooner *Edith*, owned by *S. D. Spencer* and *Edwin Metzler*, the son of defendant. The ground on which the plaintiffs seek to recover is that the money was paid by them by mistake or in ignorance of the facts, or rather on the ground that prior insurances were effected on the vessel in excess of her value, the effect of which was to make the insurance by them voidable. In the written application to the plaintiffs for insurance, the vessel was valued at \$4,000, but it appears from the evidence given on the trial that she was insured in the *New England* insurance office for \$3,000, and in the *Avon Insurance Company's* office for \$3,200, and lastly by the plaintiffs for \$800, on the application of the defendant, (who acted as agent of the owners) on a voyage at and from *St. George's, N. B.*, to *Kingston, Jamaica*, and at and from thence to *Boston*. In the policy a clause was inserted to the effect "that if the assured shall have made any other insurance upon the vessel prior to its date, then the insurance company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the

premises assured." The vessel having been insured for \$2,200 over and above the sum at which she was valued, exclusive of the sum for which she was insured by the plaintiffs, the latter contended they were for that reason exonerated from all liability under the policy of insurance effected by them for the defendant. Whether the plaintiffs, in paying over the amount claimed under the policy, acted by mistake, misapprehension of the facts, or through carelessness, is not very clear, but it is in evidence that on the 26th *December*, 1866, they paid over to the defendant the sum of \$800 as and for a total loss under that policy, which sum they are, under the circumstances of this case, entitled to recover back from the defendant unless he can shew that before notice of their claim or demand made upon him by the plaintiffs to pay back this amount he had paid it over to his principals, or in a settlement made with them, appropriated it, with their consent, to the payment of his own claim against them for monies advanced for supplies for the schooner *Edith*. The cause was heard before my brother Mr. Justice *Wilkins*, and the jury, seven to nine, in answer to questions submitted by the learned Judge, found the facts set forth in his report, which I have carefully read, and on such facts it was agreed by the counsel on both sides that the facts as found by the jury should be submitted to the Court, with powers to decide the questions of law applicable to the case, and to order all references or facts besides those found by the jury necessary to the final adjustment of the cause. There being no fraud imputed to the defendant, the main question for our consideration is whether the defendant, as agent of the owners of the vessel, did actually and in good faith pay over to them, or by their direction and consent apply in payment and discharge of his own claim against them the money so received from the plaintiffs on the policy before any notice or demand was made upon him by the plaintiffs to return it. If though not paid over to the principals, the money, on an adjustment made with the principals, was by their consent and direction honestly applied by defendant to the discharge of his own claim against and placed to the credit of his principals, before any notice or demand was made by plaintiffs to pay it back, then I think the plaintiffs' remedy must be against the

principals and not against the defendant, who being a mere agent and having no interest in the vessel, was bound to pay over the money he received or appropriate it as they directed as soon as it came to his hands. See *Holland v. Russell*, 1 B. & S., 424, decided in Q. B. in 1861, and brought on appeal before the Exchequer Chamber and affirmed; 4 B. & S., 14. *Earle*, C. J., in delivering judgment in the latter Court, says: "This is an action by the plaintiff to recover back £200 paid to the defendant by the plaintiff as underwriter on a policy of marine insurance. The defendant, who received this money from the plaintiff, received it as agent for a foreign principal. The plaintiff knew that, and paid him in that capacity, with the intention that he should pay it over to that principal, and he did so; and all the money thus received has been accounted for in a settlement of account approved by the foreign principal under circumstances which clearly amount to payment of that sum to him. The defendant having therefore been altogether an agent in the matter, is there anything which takes him out of the ordinary protection to which an agent is entitled who pays money to his principal before he received notice not to pay it, and before he knew that there was no legal duty on him to do so? There is nothing in this case to deprive the defendant of the right of an ordinary agent so to protect himself." At the conclusion of his judgment His Lordship said: "The policy was a voidable policy, but still the defendant in demanding payment of it, did his duty to his principal, and as it was voidable, only had a right to act on it as if it were a valid policy, and take the money which when received he had a right to bring into account between himself and his principal. If he had known that the insurer intended to dispute his right to receive the money on the policy, and hastened to pay it over to his principal in order to avoid that claim, or did anything else to show that the money was not paid over by him in the full belief of the validity of the transaction, it would have been a fraudulent act."

The evidence given by the defendant at the trial as to the payment and appropriation of the money received by him from the plaintiff being somewhat confused and unsatisfactory, we, in exercise of the power given to us for the purpose

appointed a Master of this Court to take further evidence on this point, who reports as follows: "I find that *Messrs. Edward Albro & Co.*, on the 9th *September*, 1864, furnished to the defendant for schooner *Edith* goods to the amount of \$154.04, and on the 9th *February*, 1865, he gave his note at four months, with \$2.32 additional, being \$156.36, which note was paid by him at maturity. I also find that *John Stairs* supplied goods for the *Edith* to the extent of \$261.83, for which sum defendant gave his note on the 21st *August*, 1865, payable, as appears by the exhibit annexed, at four months, and paid the same at maturity. I also find that at or about the last mentioned date the defendant paid the master of the *Edith* \$11.26, making a total on such three payments of £107 7s. 3d., or \$429.45. I find that on the 28th day of *February*, 1867, a settlement of accounts took place between the defendant and his son *Edwin Metzler*, and that at that time the sum of £92.12 was credited by defendant to his said son, as appears by the memorandum of such settlement in the handwriting of the said *Edwin Metzler*, but no entry appears to have been made of it in the defendant's books before the 1st of *August*, 1867. There can, I think, be no doubt from the facts reported by the master and the vouchers accompanying his report, that the owners of the schooner *Edith* were justly indebted to the defendant in the sum of £107. 7s. 3d. for monies paid and advanced by him to *Albro & Co.* and *Mr. Stairs* (long before the receipt of the insurance on the *Edith*) for goods respectively supplied by these persons for that vessel, nor is there any reason to doubt that the sum of £92 12s. 9d. was justly due to the defendant by his son *Edwin* for advances made to him as part owner of the vessel. There is also no reason to doubt that on the 9th day of *January*, 1867, *Spencer* and *Edwin Metzler* both met at the house of defendant either for the purpose of adjusting their accounts with him or for appropriating the sum of \$800 received by defendant from the plaintiffs under the policy of insurance on the *Edith*, and that they on that occasion agreed to pay to defendant, or rather agreed that defendant should retain in his hands out of the money so received from plaintiffs, a sum sufficient to pay and satisfy his own bill against the vessel and owners, amounting, as it appears, to £107 7s. 3d.,

and pay over to *Edwin Metzler* £92 12s. 9d., the balance left of that money. It also manifestly appears that for the purpose of carrying out this arrangement an order was drawn by *Samuel D. Speneer*, with the assent of *Edwin Metzler*, upon the defendant, dated on the same day of such meeting (*Jan. 9th, 1867*), at the foot of which order is a minute shewing that the sum received by defendant for insurance was meant thus to be applied.

Such being the facts, the question arises whether the appropriation so intended was actually carried out and whether the owners of the vessel were thenceforth discharged from the payment of the debt so due to defendant for moneys previously advanced for them, and, also, whether the money due by the son to the defendant was retained by the latter out of the sum received by him from plaintiffs, with the consent of the son, in full satisfaction and discharge of such indebtedness. If so paid and so retained it would, I think, be hard to compel the defendant to refund. It appears from the report of the master that a settlement of accounts took place between the defendant and his son *Edwin* on the 28th *January, 1867*; and that at that time the sum of £92 12s. 9d. was credited by defendant to his son, as appears by a memorandum of such settlement in the handwriting of the son. That settlement was made and the sum credited a short time after the order by *Spencer* was drawn on defendant, by which the latter was directed to pay his son the balance remaining in his hands after retaining for his own bill £107 7s. 3., and therefore the retention of that balance, with the consent of the son, must, I think, be regarded as a *bona fide* payment made by the defendant. There is, it is true, no entry in the defendant's book of any credit given to the owners of the vessel for this last mentioned sum, but there is the order drawn upon defendant by *Spencer*, one of the owners, with the consent of *Edwin Metzler*, the other owner of the vessel, only a few days after the defendant received the amount insured upon her, authorizing defendant to retain his own bill out of it, and, whether credited or omitted, to be credited in defendant's books, it was nevertheless a payment made by the owners of the vessel to the defendant, such as, it appears to me, would preclude him from afterwards recovering the amount from the owners,

and the defendant having expressly sworn that both payments were made seven months before any notice was given to, or any demand made upon him, to return the money, I think the defendant, under all the circumstances, is not now bound to refund it, and that he is entitled to our judgment.

RENNER v. HALIFAX STEAMBOAT COMPANY.

In an action against defendants for damages a verdict was found for plaintiffs, and subsequently defendants applied for a new trial on the ground of new and important evidence having been discovered which was unknown to them at the trial, and which, their agent in his affidavit stated, was such as he believed would entitle them to a verdict.

Held, that a new trial ought to be granted on the defendants paying the costs of the first trial.

DESBARRES, J., now, (March 10th, 1873,) delivered the judgment of the Court, as follows:

This was an action against defendants for preventing and obstructing the light and air from entering through the windows of plaintiff's dwelling by the erection of a building and wall near the windows, for which the jury found a verdict for plaintiff for \$50 damages. A rule nisi for a new trial was granted on the ground of the discovery of new and important evidence for the defendants, which was unknown to them at the trial, evidence which their agent, *McKenzie*, in his affidavit, states is such as he believes will entitle the defendants to a verdict in this cause.

The case of *Broadhead v. Marshall* 2 Wm. Black., 955, was cited at the argument by *Mr. Rigby*, in support of the rule, in which the discovery of new evidence by the attorney of the defendants, an execution which was in the actual custody of the attorney himself, though not known by him to be, was held to be a good ground for a new trial. *Thurtell v. Beaumont*, 1 Bing., 339, cited by *Henry, Q. C.*, in opposing this rule, was an action against an insurance company to recover a loss by fire, the defence being that the plaintiff himself had wilfully set fire to the premises. The Court, on affidavits disclosing a conspiracy to defraud the insurance company, and showing that the defendants did not attain a

knowledge of it till after the trial, granted a new trial on payment of costs. Again in *Barge v. Calloway*, 7 Price, 677, a new trial in ejectment was granted where a verdict had been found for defendant, where the lessors of the plaintiff had since the trial discovered that they had conclusive evidence of a material fact (the marriage of their ancestor) which they failed to prove at the trial in consequence of mistaking the christian name of the person to whom the ancestor had been married. But the Court would only do so on the terms of the costs of the former trial and the application for the new trial being first paid. *The want of knowledge at the trial of the evidence discovered after, and the conclusive character and sufficiency of that evidence to entitle the party making the application to a verdict in his favor are grounds on which the Court will generally grant a new trial.*

Now in this case the facts disclosed in the affidavits made by *Jordan* and *Morris* are such as to warrant the belief that if they had been proved at the trial the verdict would have been the other way, and, therefore, it appears to me, that this is a case in which a new trial ought to be granted, in order that justice may be done between the parties, but it must be on the payment of the costs of the former trial.

CORNELIUS v. BURTON.

DEFENDANT made a distress upon plaintiff for rent lawfully due, but did not give him the five days' notice of the sale of the goods distrained prescribed by statute.

Held, That he was a trespasser *ab initio* and liable in damages.

WILKINS, J., now, (March 10th, 1873,) delivered the judgment of the Court :

The question which underlies our deliberations in this case is,—was the *English* statute, 11 Geo. II., ch. 19, in respect of those clauses which refer to irregularities in observance of statutable requisitions subsequent to a distress and to excessive distress, in force in this Province when the transaction occurred which gave rise to the action? I am of opinion that it was not. It would be difficult to hold that a Colonial

Legislature legislating in a matter that had been the subject of Imperial legislation, and expressly enacting some of the statutes then existing which had been enacted by the *English* Legislature, but not enacting other statutes in the very same matter, had not enacted these last because it considered them so plainly applicable to the circumstances of the colony that its Supreme Court would therefore recognize their binding obligation and judicially declare them to be in force. It is obvious that such a principle might be carried to a dangerous length and introduce mischievous uncertainty in the law. A directly opposite presumption might be fairly considered to exist. But however that may be, it would be impossible, I think, to say that where Colonial Legislature showed unmistakeably that in framing an enactment the legislature have had before its mind and as its model, a particular Imperial act, from which it had selected for enactment certain clauses, while there were others in the same statute which it had not enacted, these clauses last referred to had thereafter the force of law in the colony. It will be seen that this state of facts distinguishes our legislature in relation to the subject matter of our enquiry. In 1768 *Nova Scotia* first legislated in the matter of enabling the sale of goods distrained for rent. It is certain that this was done in view of the imperial acts then in force in *England*, viz., *William and Mary*, Session 1, ch. 5 ; 8 *Anne*, ch. 14, and the 11 *Geo. II.*, ch. 19. We find that the first four sections of our old statute, 8 *Geo. III.*, ch. 4, are transcripts of the acts of *William and Mary*, the 5th, 6th, 7th, 8th, 9th and 10th sections are taken from the 8th of *Anne*, ch. 14, as is also substantially the 13th section; whereas the 11th and 12th sections are not found in either of those two last mentioned *English* statutes, but are copied from the 8th and 9th sections of the 11 *George II.*, ch. 19. It is observable also that while legislature deemed it expedient to enact in terms in section 12 of our act, the first part of section 9 of the act of *George II.*, which requires that the tenant shall have notice of the place where the distress is deposited, it omitted to enact the remaining part of that section although it is very important and entirely applicable to our colonial condition, but enacted no other of its provisions. It must therefore be taken to have said that the remaining sections,

including of course those that toned down the severity of the former law, which made trespassers *ab initio*, those who, after legally making a distress for rent, were guilty of any subsequent irregularity in relation to it, were inapplicable to the circumstances and condition of this colony, and therefore not proper to be in force in it. This necessarily implied view of legislative opinion has been thrice manifested in this Province, viz., first when the old statute of 1768 was passed, and secondly and thirdly when the two consecutive series of the *Revised Statutes* were enacted. Our present law, chap. 145 *Revised Statutes* contains no provision that was not in the statute of 1768. Such then being the statute law which governs the case before us, it follows that this defendant having entered on the premises of the plaintiff to distrain for rent confessedly due though it was, and having sold the goods of plaintiff distrained on without having given the notice required by the statute, was a trespasser in his first act and in every subsequent act of his proceedings. In *Comyn's Digest*, Tres. 2, two acts are stated that make a man a trespasser, *ab initio*. If a purveyor who takes my cattle for the king's honor, sells them. If a man has authority given by statute and does not pursue or abuses his power, as if a man having authority by statute, § *William and Mary*, to sell a distraint for rent, if it be not replevied within five days after notice, he sells it without notice given. Some of the plaintiff's goods were sold and converted into money by the defendant's authority, and for his benefit. The defendant's illegal acts have imposed on the plaintiff the difficulty (which a jury must solve) of deciding on the value of the goods so taken and sold. The defendant being such trespasser it was competent to the plaintiff to maintain trespass for entering on his possession of the shop and barricading his entrance, and to maintain trespass or trover for seizing and selling the goods. The facts in view of the law, if I have correctly stated it, render unavailable any plea of justification set up by the pleadings. To the count in trover a special plea asserts a legal statutable taking and distraining. That, met by a replication that the distress was made without any notice being given of the distress. Here is an issue which, under the reported facts, must necessarily be found for the plaintiff. If indeed the

clauses in question of the *11 George II.*, chap. 19, were in force in this province, I should be prepared to hold that if no notice at all of the fact of a distress being made was given to the tenant, there would be no valid distress. This I assert after having carefully considered all that *Woodfall* has written on the subject, and after a diligent review of the leading cases to which he refers, I allude particularly to *Trent v. Hunt*, 9 Exch., 14; *Lucas v. Tarleton*, 3 H. & N. 116, and *Wilson v. Nightingale*, 8 C. B., 1034, in all of which cases there was notice to the tenant, in fact though it was insufficient in law. the language of the statute is, where any goods are distrained, &c., and the tenant or owner shall not, within five days next after the distress taken, and notice thereof, &c. A tenant in arrears for rent may be fairly presumed to know (the law presumes that he knows that the rent is due, and how much, and that his goods are liable to distress,) but surely it would be a violent legal presumption that he knows, when no notice at all has been given of the fact, of a distress having been made on his property.

In *England*, unlike the state of law existing here, selling before expiration of the five days would be a mere irregularity and a plaintiff suing in case founded on it, proving no damage, could not recover even nominal damages. In *England*, too, when the rent is really due, and the distress therefore lawful, trover could not be maintained if the landlord sold within the five days, because defendant would be deemed in possession, from the fact of the distress. *Rogers v. Parker*, 18 C. B., 111. Aliter in this province, from the combined effect of the provisions in question of *11 George II.* not being in force, and of the rule in the Six Carpenters' case. Here it is impossible to regard the not giving any notice and the omitting to make an appraisement after a distress, though for rent really due, as a mere subsequent irregularity. In that light, however, this case was submitted to the jury, and the extent to which the plaintiff might have been prejudiced by those irregularities was stated by the learned Judge who tried the cause as a principle by which the jury ought to regulate their estimate of the damage sustained by the plaintiff. That was put to the jury by the learned Judge in contrast too with this observation which immediately followed,

viz., but no evidence had been given by the plaintiff that any of his goods had been sacrificed by a sale, or sold for less than their real value. It is quite possible that if the case go to another jury no larger amount of damages may be given, but I think the plaintiff is entitled to have his case reconsidered in the light of an instruction from the Bench, that in the eye of the law the defendant was a wrong-doer in making the distress, and in all his subsequent proceedings in relation to it. An opinion has generally prevailed, and I incline to think it has been acted on in practice in this Court, that the provisions in question of the *11 George II.* were in force in this province, and that the learned Judge should have been under that impression at the trial was most natural. In that view his direction was unimpeachable, but after the questions were tried out and that general impression found to be erroneous, it would not be right to tell a jury in such a case as this that justice would be vindicated by a verdict for nominal damages. The fire that supervened on the transactions, and the death of the bailiff were unfortunate events, and events that have excluded much light that otherwise would have been shed over the case, but if either party is to suffer from these it should be that party who acted illegally in entering the premises of the other and interfering with his property deposited therein. By means of an examination of *Monteith* alone could it have been disclosed that specific goods of the plaintiff were sold or appropriated by him so as to realize therefrom that amount (whatever it was) that the bailiff paid over to the defendant, and whether in respect of such selling or appropriation there was or was not, on the part of *Monteith*, an unnecessary sacrifice relatively to value, or a spoliation of the plaintiff's property, the plaintiff in the nature of things could give no proof that would remove the doubt that hangs over this matter, but if he had received the notice which the statute requires he might have taken steps that would have prevented a necessity for adducing such evidence.

The rule for a new trial should, I think, be made absolute.

IN THE MATTER OF CHARLES PYKE, AN INSOLVENT.

C. P. obtained a piano from P. & S. on hire, with the privilege of purchasing it for \$350, by paying certain instalments within a certain time. Among other conditions of a written agreement entered into by C. P. at the time of receiving the piano were, that it should remain the property of P. & S. until fully paid for, that in default of any instalment they might resume possession without previous demand, and that C. P. should pay interest upon the purchase money at 7 per cent. C. P. paid only two instalments amounting to \$150, and then became insolvent. On P. & S. claiming the piano they were opposed by H. L., a creditor of C. P., who claimed under an assignment made to him by C. P. as security for his debt, and received by him without any knowledge of the agreement with P. & S. This assignment was ~~duy filed and~~ registered. The Judge in Insolvency decided against the claim of P. & S. upon the grounds,—that the agreement with them was void for usury, interest at 7 per cent. being provided for; that having left the piano in C. P.'s possession after the time for his paying for it had expired, they could not set up their claim against a *bona fide* purchaser, and that their agreement should have been filed and registered. On appeal to the Supreme Court,

Held, That the Usury statute did not apply at all, as it was not the case of a loan but a conditional sale; that the claim of P. & S. was not prejudiced by their not having taken back the piano as soon as the time was up; that C. P.'s agreement with them not being in the nature of a bill of sale did not require to be registered, and that P. & S. should have the piano on paying to H. L. the amount they had received on its account from C. P.

When obtaining the rule *nisi* from the Judge in Insolvency P. & S. did not produce the original agreement of C. P.'s with them.

Held, That they were not thereby precluded from producing it at the argument of the rule or accounting for its non-production.

RITCHIE, J., now, (March, 1873,) delivered judgment as follows:

At the time of the insolvency of *Pyke*, he had in his possession a piano-forte, for which a claim was made by Messrs. *Peiler, Sichel & Co.*, on the ground that it was their property, and was held by the insolvent under the following agreement in writing, signed by him, bearing date the 6th *February*, 1872: "Received from *Peiler, Sichel & Co.*, on 7th *October*, piano by *Harries*, No. 11706, on hire for six months, at eight dollars per month, payable in advance, the said piano-forte being valued at \$350, which sum I agree to pay in the event of the said instrument being injured, destroyed, or not being returned to *Peiler, Sichel & Co.* on demand, free of expense, in good order, reasonable wear excepted; it is agreed that I may purchase the said piano-forte for the sum of \$350, payable, \$60 cash and \$60 or \$75 per quarter, with interest, \$7.70; but until the whole of said purchase money be paid the said piano-forte shall remain the property of *Peiler, Sichel & Co.*, on hire by me, and in default of the punctual payment of any instalment of the said purchase money, or of the said monthly rental in advance, *Peiler, Sichel & Co.* may resume

possession of the said piano-forte without any previous demand, although a part of the purchase money may have been paid, or a note or notes given by me on account thereof, this agreement for sale being conditional, and punctual payment being essential to it; but, in the event of the said piano-forte being so returned to them in good order, any sum received on account of the purchase money beyond the amount due for interest, and any expenses incurred in reference to the said instrument will be returned."

It appears that *Pyke*, having received the piano-forte, agreed to purchase it on the terms above mentioned, and paid \$60 on account, and at or after the expiration of three months paid \$90 additional, since then no payment has been made.

This claim of Messrs. *Peiler, Sichel & Co.* was met by a counter claim of *Henry Lawson, Esq.*, who asserted a right to the piano-forte under an assignment made to him by *Pyke* as a security for a debt, and received by him without any knowledge of the agreement referred to, and in the belief that the piano was the property of *Pyke*, this assignment was duly filed and registered. On the claim of Messrs. *Peiler, Sichel & Co.* coming before the Judge of Probate and Insolvency, he made an order that the instrument should be delivered to them upon their paying the amount received from the insolvent on account thereof, after deducting the amount due for rent and expenses, pursuant to the terms of the agreement, unless cause to the contrary should be shewn before him, and he directed that copies of the rule *nisi* should be served on the assignee or guardian of the estate, the attorney of the insolvent, and the attorney of *Mr. Lawson*. On the argument of this rule it was contended on behalf of *Mr. Lawson* that the original agreement had not been produced to the Judge when the rule was obtained, nor was the absence of it accounted for. That the agreement was void under our statute against usury. Seven per cent having been agreed to be paid. That the insolvent having made payments upon the piano-forte—and six months having expired and Messrs. *Peiler, Sichel & Co.* having left it in his possession, they could not set up their claim against a *bona fide* purchaser from *Pyke, &c., &c.*; it was also contended that the agreement with them should have been filed and registered under Cap. 119 of the *Revised*

Statutes. The Judge of Probate and Insolvency, having decided against Messrs. *Peiler, Sichel & Co.* on all the grounds, and that the property in the instrument passed to *Mr. Larson* under his bill of sale, decreed that their application should be dismissed with costs.

From this decree there was an appeal to this Court which was argued during the last term.

Though the original agreement between Messrs. *Peiler, Sichel & Co.* and *Pyke* was not produced when the rule *nisi* was granted, the affidavit on which it was obtained stated the existence of it, and had annexed what was alleged, and was not denied to be a true and correct copy of it, as entered into and signed by *Pyke*, and on the argument it appears that when the objection was taken their attorney requested the Judge to allow him to produce the original document or account for its existence, which the Judge refused, on the ground that no such evidence could be adduced after the rule *nisi* had been taken out.

In ordinary cases, on the argument of rules *nisi*, the party obtaining them is precluded for relying on any evidence not offered and referred to in the rule, but in this case the parties have stated, under oath, facts which, in their view, entitle them to the judgment of the Court, it was open to the other side to contest the validity of the agreement, or deny its existence, and to call for its production, but to hold that because it was not produced in the first instance it could not be produced at the hearing when the question to whom the piano-forte belonged came before the Court, would be sacrificing substance to form and working a manifest injustice.

Our statute in relation to usury does not, in my opinion, apply to this case, there has not been a loan here, and for usury to attach there must be a loan. See *Holt, R.*, 260; *Floyer v. Edwards*, 1 Cowp., 112, is like the case before us. There it was contended that though a loan is necessary to constitute a usurious contract, yet on a sale, the instant the limited credit is expired, from that moment, if the money remains unpaid, the condition of the parties is changed, for the buyer becomes a borrower and the seller a lender, and that it was not necessary for the creation of a loan that

money should be paid on the one hand and received on the other; for the money remaining in another's hands in consequence of an agreement for that purpose, will equally constitute a loan; but Lord *Mansfield* held that the contract was not usurious, as the sale was *bona fide* and not a borrowing, under-color of a sale. And Lord *Ellenborough* in *Barclay v. Walmsly*, 4 East., 56, said that to constitute usury there must either be a direct loan and a taking of more than legal interest for the forbearance of repayment, or there must be some device contrived for the purpose of concealing or evading the appearance of a loan, when in truth it was such, and the operation of our statute on the subject is in terms confined to the case of loans, as was the *English* statutes, from which it was derived. Lord *Tenterden*, C. J., in *Beete v. Bidgood*, 7 B. & C., 453, adopts the same view of the case. The important point involved in this case, however, is whether the agreement between the parties is to be considered simply as a hire of the piano-forte to *Pyke* until he had fulfilled all the conditions specified to entitle him to become a purchaser, or as an actual sale to him after a payment had been made under the clause entitling him to purchase.

Assuming, as we must do in this case, that the document now before the Court constitutes the real *bona fide* agreement between the parties and if we shall arrive at the conclusion that it does not require to be registered to give it efficiency, *Mr. Lawson's* only ground of objection could be that, as possession of personal property is *prima facie* evidence of title, a vendor might, by such a contract, collude with the vendee and enable him to impose on innocent parties, and if that were shewn to be the case the vendor would not be allowed to take advantage of his own wrong, but when such an agreement was entered into in good faith the creditor of the vendee is in no worse position than if the article had been leased in the ordinary way, *Pyke* himself could not have a title asserted adversely in the piano-forte till he had paid for it in full, and he had no authority to sell, all that he could dispose of was his interest under the agreement.

Gilbert v. Thomson reported in a note to 3 *Gray, R.*, 545, though only a *nisi prius* decision is in all essential particulars identical with this case. It was replevin for a piano-forte, of which the plaintiff made a conditional sale to *Galusher*, the terms being that until the full price, \$280 should be paid, the title should not rest in *Galusher*, but plaintiff should continue owner, having a right to take possession, and remove it if the stipulated price should not be paid, and, in that event *Galusher* was to pay a stipulated rent. The instrument was delivered under this agreement and the plaintiff afterwards demanded payment of the price and received \$45 on account, and had since demanded the balance, without success. Shortly after the agreement *Galusher* mortgaged the piano to *Knight* to secure a debt of \$150, and the mortgage was duly recorded; subsequently, *Knight* purchased it and sold it to the defendant. The Court held that the plaintiff was entitled to recover, and in the principal case *Coggle et al. v. Hartford and New Haven R. R. Company*, *Bigelow, J.* said: It has long been a settled rule of law with us that a sale and delivery of goods on condition that the property is not to pass until the purchase money is paid and secured, does not pass the title to the vendee, and the vendor, in case the condition is not fulfilled, has a right to possess himself of the goods both against the vendee or his creditors claiming to hold them under attachment. So in *Smith's Mer. Law*, 482, even when goods are actually delivered to the vendee, the delivery may be on a condition, a breach of which reverts the property in the vendor and entitles him to recover back the goods in trover.

It only remains to be considered whether our act relating to the registering of bills of sale applies to such a case as this, to arrive at such a conclusion we must hold the document in question to be a bill of sale from *Pyke* to *Peiler, Sichel & Co.*, whereby the property was conveyed to them, while the possession was held by *Pyke*, the vendor, for that is the class of conveyances requiring reputation under our act, which, in this respect, is a transcript of the *English* act; to come to this conclusion we must consider *Pyke* the purchaser from the time he made a payment on account of the purchase and gave the agreement or mortgage, back to the seller to secure the price. It is only necessary to revert to the terms of the agreement

to see how foreign this was from the real and expressed intention of the party ; the document is not in its terms a bill of sale, and did not pass the property to *Pyke*, and it expressly stated that it should not do so. In *Allsop v. Day*, 7 H. & N., 462, *Pollock*, C. B., referring to a case where the necessity of registering an instrument came in question, said : " we cannot extend the provisions of the act merely because a particular contract, or instrument, is within the mischief intended to be remedied, if there is any enactment which ought to be construed strictly it is a clause which declares that one thing shall mean another." *Channel*, B., " my judgment proceeds on the principle that the document is not a bill of sale ;" and *Wylde*, B., " I am disposed to adopt the interpretation that a bill of sale means an instrument by which the property passes."

In my opinion the agreement in the case before us does not come within the terms of the said act or its spirit, and is not even within the mischief which it was intended to remedy. I am therefore forced to the conclusion that the decree of the Judge of Probate and Insolvency must be reversed, and that the piano-forte should be held to be the property of Messrs. *Peiler, Sichel & Co*, and that it be delivered up to them on their paying to *Henry Lawson, Esq.*, to whom it was assigned by *Pyke*, the sum of \$150, which they received from *Pyke*. I think that there should be no deduction as the point was new, and *Mr. Lawson* having had the judgment of the Court below in his favor, each party should bear his own costs.

DUNN v. MILLER.

A MORTGAGEE, in the absence of any express covenant or stipulation to the contrary, is entitled to enter upon and take possession of the lands and premises conveyed in the mortgage at any time, although, as an almost invariable rule in this country, the mortgagor remains in possession until default in fulfilment of the conditions of the mortgage.

DESBARRES, J., now, (March 10th, 1873,) delivered the judgment of the Court :

This was an action of trespass, *qu. cl. fre.*, against the defendant for entering upon and taking possession of land to which the plaintiff claims title under a deed executed to him by *George Miller* and wife, dated 20th November, 1860,

the grantors having previously thereto, on the 14th *March*, 1837, executed a mortgage of the same land to one *Thomas Suther*, who by deed of assignment dated 6th *January*, 1869, assigned and transferred the mortgage to one *George Hamilton*, under whose authority the defendant entered and did the acts complained of by the plaintiff. The case was tried, or partly tried before Mr. Justice *Ritchie* at *Windsor* in *September* last, and seeing that it rested altogether on a question of law, it was withdrawn from the jury and mutually agreed between the parties that a verdict should be taken for the plaintiff, subject to the opinion of the Court, for \$35, and judgment entered thereon; in the event of the Court deciding that on the proofs and admissions made in the cause he was legally entitled to recover thereon, otherwise the judgment should be for defendant. The facts admitted are such as I have already stated, with the addition of the following, that an action of ejectment was brought by plaintiff against *George Miller* in 1865 for the same land in which judgment was recovered by the plaintiff, and an entry made thereon, after such judgment, of which there was a record. The sole question therefore for the consideration of the Court is, whether the defendant, acting under the authority of the mortgagee, was in law justified, under the facts proved and admitted, in entering upon and taking possession of the land mortgaged, without any demand upon, process against, or notice to plaintiff; or whether he is to be regarded as a trespasser and held responsible as such for his acts, which are not pretended to be denied. I am not aware that the question raised here has ever been brought before and decided in this Court, though it appears to be a question well settled in *England* and in the *United States*, and one which, looking at the important interests involved in it, ought also to be settled here.

In *1 Washburne on Real Property*, at page 95, he says what is well known to every lawyer: "That by the common law a mortgagee in fee of land, is considered as absolutely entitled to the estate which he may devise or transmit by descent to his heirs. He takes it subject to its being defeated by the grantors doing some act such as the payment of money in a prescribed time and manner, and often subject to the

right of the grantor to occupy the land till he fails to perform the condition of his deed." At page 100 he says: "In *Massachusetts, Maine, and New Hampshire*, it has been repeatedly held that as between the mortgagor and mortgagee the legal freehold passes by the deed of the former to the latter, and that unless restricted by the terms of the deed, the mortgagee may enter at, on or upon the premises, nor would he be liable on trespass to the mortgagor for making such entry or exercising any ordinary acts of ownership upon the premises." At page 109 he says the common law right in a mortgagee to enter and take possession of the premises at any time is restricted altogether in some States by statute. In others, as in *Vermont and Wisconsin*, a mortgagor has a right by statute to retain possession until condition is broken, unless there is a clause inserted in the deed giving a right of entry. In other States named a mortgagor has a right to the possession of the mortgaged premises unless provision is otherwise made in the mortgage deed. At page 110 he observes that these rights and liabilities of mortgagor and mortgagee in respect of taking and holding possession extend to their respective assignees. It seems then that the common law right in a mortgagee to enter and take possession of the premises does not prevail in all the States of the Union, though it does prevail in *Massachusetts, Maine and New Hampshire*, as has been already remarked. There is no evidence to show that the mortgage from *Miller to Suther* was made subject to the right of the mortgagor to occupy the land till he failed to perform the condition therein, and therefore it is contended that the assignee of the mortgage had a legal right at any time to enter upon and take possession of the land. This right, though it may exist, has rarely if ever been exercised by mortgagees in this Province, and in the great majority of cases the mortgagors, without making any express provision in the mortgage deeds for that purpose, have occupied the land till failure of payment of the money has been made; but on considering this case I need not say that we can only look to the legal rights of the parties and not any usage as to the occupancy of the mortgaged premises that may hitherto have existed as between *Mortgagor and Mortgagee*, under a misapprehension of the law. The principle

laid down in *Washburn* as prevailing in the three last-mentioned States of the Union as to the mortgagees right to enter the mortgaged premises, is supported by *English* authorities, one of which is the case of *Doe dem. of Roby v. Maisy*, 8 B & C., 767, in which Lord *Tenterden* says: "The mortgagor is not in the situation of a tenant at will, or at all events he is not more than tenant at sufferance, but in a peculiar character liable to be treated as tenant or as trespasser, at the option of the mortgagee." See also *Fisher*, 5952, and the cases therein cited, as sustaining the principle laid down in this case. The case of *Lackey v. Holbrook*, 11 Metcalfe, 458, is a very strong case in favor of the defendant, and fully sustains the principle laid down in *Doe dem. Roby v. Maisy*. That was an action of trespass for breaking and entering plaintiff's dwelling-house and carrying away his goods, in which it was proved that in the absence of the plaintiff and his family, defendant *Holbrook* entered the house occupied by plaintiff, of which he had a warranty deed, dated before such entry, by opening the outer door, and that the other defendant being a deputy sheriff, and having a writ against plaintiff in favor of *Holbrook*, attached the plaintiff goods mentioned in the writ, by direction of *Holbrook*. The defendant gave in evidence a mortgage deed of the house made by plaintiff to him of the same date as the deed to plaintiff. The condition of the mortgage did not appear to have been broken, but it contained no provision that the mortgagor (the plaintiff) was to remain in possession, and it was contended, as in the present case, that the defendant, under the mortgage deed, had therefore a right to enter at any time, and that the plaintiff could not maintain the action against him or against the other defendant, who acted under him. The Judge at the trial ruled that the mortgage deed gave *Holbrook* no right to enter without previously giving the plaintiff notice to quit, and that the action might be maintained; exceptions were taken to the Judge's ruling and the case having been brought under review of the Supreme Court of *Massachusetts*, the judgment of that Court was, that a mortgagee had a right to immediate possession of the mortgaged premises when there was no agreement that the mortgagor should retain the possession until breach of the condition of the mortgage. The learned

Judge who delivered the judgment remarked that the doctrine then expressed was so well established by repeated decisions of that Court, it had now become incorporated in the statute law of the commonwealth. It was true, he said, that by the entry an opportunity was afforded to the officer to serve a legal process and make an attachment of the goods of the plaintiff, but that did not affect the main question, namely, the right of *Holbrook* to enter upon the premises, he holding a mortgage of the same, adding that this right of entry as mortgagee might be exercised without notice to quit being previously given. See *Miner v. Stevens, et al.*, 1 Cushing, 484; *Keech v. Hall*, 1 Doug. 22. The cases bearing upon the subject shew that the right of the mortgagee to enter upon and take possession of the mortgaged premises when there was no express stipulation or agreement to the contrary, though it may not be in practice, nor have been exercised here, is, nevertheless, a right too well established as well by *English* as *American* authorities to be disputed. This doctrine was not in fact controverted by *Mr. Weeks*, counsel for plaintiff, at the argument, who, while admitting the right of entry of the assignee of the mortgage, mainly contended he had no right to lease the mortgaged premises to the defendant, and that viewing the latter as a lessee, his entry as such was unlawful, and being unlawful he was necessarily to be regarded as a trespasser. The case of *Hungerford v. Clay*, 9 Mod., 1, referred to in *Hill on Mortgages*, at page 176, decides that before foreclosure a mortgagee cannot lease to bind the mortgagor unless from necessity and to avoid an apparent loss. This point would have demanded our attention had there been any evidence before us to shew that the defendant entered the premises in the character of a lessee, but the evidence is that he entered by the authority of *Hamilton*, the assignee of the mortgage, an entry which is therefore to be looked upon in the same light as a personal entry by the assignee himself, so that the objection assuming it to be good is not one that can prevail.

I am of opinion, on consideration of the subject, and upon the evidence before us, that *Hamilton*, the assignee of the mortgage, standing in the same character and holding the same position as the mortgagee before assignment, had a legal

right to enter upon the mortgaged premises, (there being no clause or stipulation in the mortgage restricting that right,) and that having authorized the defendant to make the entry for him, the latter cannot be regarded as a trespasser, and consequently the plaintiff is not entitled to recover. The judgment of the Court, under the agreement entered unto between the parties ought, in the view I take of this case, to be entered for defendant, with costs.

It is possible that had the entry of the defendant been accomplished by violence or accompanied with destruction of the property, a different rule might have prevailed, but the acts complained of appear to have been nothing more than were necessary for taking a crop off the land which, by the agreement, the defendant was to have, abstaining from any further trespass or meddling with fences until judgment.

HILL v. CULMAN.

PLAINTIFF sued on a promissory note for \$79.25, and defendant pleaded the usual pleas, denying the making, consideration, &c. Plaintiff applied at Chambers to have the pleas set as false, frivolous and vexatious, and in opposing his motion defendant produced an affidavit in which he admitted indebtedness to the amount of \$42.72, but no more, and alleged that his pleas was not pleaded for purpose of delay, but that justice might be done. The Judge at Chambers set the pleas aside, and defendant appealed.

Held, That his appeal would be sustained provided the \$42.72 was paid into Court within ten days. Otherwise Plaintiff should retain his judgment.

DODD, J., now, (March, 1873,) delivered the judgment of the Court as follows :

This was an appeal from an order at Chambers made by Mr. Justice *McCully*, setting aside the pleas in the cause upon the grounds that they were false, frivolous, and vexatious. The action was on a promissory note made by the defendant, dated 7th September, 1871, payable to the plaintiff or order, for \$79.25, one month after date. The common counts were also included in plaintiff's writ. The defendant pleaded first, that there never was any value or consideration for making the note ; secondly, that the note was made for the accommodation of the plaintiff, &c., and that the same was not stamped according to law ; thirdly, that the proper stamps were not affixed to the said note at the proper time and by the proper

person; fourthly, that he never made the note; fifthly, plea to the common counts that he never was indebted. Upon the affidavit of the plaintiff and *Thomas Lunnan*, the Chief Justice granted a rule *nisi* to set aside the pleas as false, frivolous and vexatious, and pleaded solely for delay, &c., unless cause to the contrary was shewn before a Judge at Chambers on Tuesday, the 24th *September*, following. The plaintiff in his affidavit shewed that the defendant came to him with *Thomas Lunnan*, and of his own free will and without solicitation, agreed to sign and did sign the note for the debt due by him to deponent; that the defendant was and still is fully and truly indebted to deponent in the sum claimed in this suit. That the debt was first incurred by defendant purchasing from plaintiff lumber and building materials, and that after sending the said *Thomas Lunnan* several times to defendant to collect the said debt, they together came to plaintiff, and defendant gave the said note, as before stated. That defendant never disputed his liability for the said note, and never gave plaintiff a note for his, the plaintiff's accommodation. That the stamps were affixed to the note when the note was given. The affidavit of *Thomas Lunnan* states that, under the directions of the plaintiff he applied several times to the defendant for payment of the debt for which the note sued on herein was given, and that the defendant on every such occasion admitted his indebtedness, and appointed several periods at which he could pay the amount. That having violated all his promises in that respect, finally proposed to give a note for the amount, and deponent accompanied the defendant to plaintiff's house where he gave the note sued on for the said debt. That after the note was dishonored, deponent called several times on the defendant, and that upon four or five occasions he promised to pay the note in a few days. The defendant, at the hearing of the cause, produced an affidavit made by himself, in which he states that the last account received by him from the plaintiff, and the last business transaction he had with him, is included in the account annexed to his affidavit, and that the sum at the bottom of said account written \$42.72, was the only sum then due by him to the said plaintiff, and that he had not purchased any articles from the plaintiff since the last article mentioned in

said account, and that neither the plaintiff or *Thomas Lunnan* have ever made a demand on him for any other sum than the said \$42.72 since the said last-mentioned charge. That his pleaded were not false, frivolous and vexatious, nor are they pleaded for the purpose of delay, but in order that justice might be done to him.

It is unnecessary to refer further to the affidavit of the defendant, as what I have referred to appears to me sufficient to justify a trial of the cause; one of the grounds of his appeal from the decision of the Judge at Chambers is, that the defendant does not owe the sum claimed, nor any sum under the writ and particulars and yet in his affidavit he admits he is indebted to the plaintiff in the sum of \$42.72. I therefore think that sum should be paid into Court for the plaintiff, and that the cause should then proceed to trial for any amount due beyond the sum so paid in, and if not paid in within ten days from the date of this rule, then the appeal to be dismissed and the plaintiff to retain his judgment.

KERR v. DAVISON.

PLAINTIFF was a land surveyor, appointed by the Government of the Province, and defendant wrote a letter to the Provincial Secretary, complaining of plaintiff's conduct, and making certain charges against him, whereupon plaintiff proceeded against him for libel. Defendant pleaded that his letter was a privileged communication. The Commissioner of Crown Lands, and not the Provincial Secretary was the person to whom the letter should properly have been addressed. The learned Judge who tried the cause directed the jury that if they thought the letter was, in view of plaintiff's official relation to the Government and the Crown Land Department, written in good faith and without malice, it was a privileged communication. The jury found a verdict in favor of the plaintiff. On argument of the rule to set the verdict aside,

Held, That although the letter should strictly have been addressed to the Crown Land Department, yet that the Judge's direction was right, so rule discharged.

McCULLY, J., now, (March 10th, 1873,) delivered the judgment of the Court:

This was an action of libel tried before Mr. Justice *Wilkins*, at the October Sittings, at *Halifax*, 1872, resulting in a verdict for defendant.

A rule *nisi* was taken under the statute to set the verdict aside, and for a new trial.

Plaintiff was a surveyor of land in the County of *Annapolis*, and defendant wrote the letter complained of, addressed

to the Provincial Secretary of the Province—*Hon. W. B. Vail*—complaining of his conduct, and making certain charges which, unless privileged under the circumstances, were doubtless libellous.

Plaintiff's declaration contained two counts substantially for the same cause of action as alleged by defendant and not put on issue or denied.

Defendant pleaded six pleas in all, but relied mainly upon his fourth plea at the argument, which was as follows: "That the words used were, under the circumstances in which they were written, a privileged communication." And if that were so, the finding was clearly right.

The letter in question was written, addressed to the Provincial Secretary and not to the head of the Crown Land Department, and plaintiff relied upon this largely as an answer to the plea. The case of *Blagg v. Sturt*, 10 Q. B., 899, was cited by plaintiff's counsel and stated to be overruled by defendant's counsel, but it doubtless expounds the principle correctly, when it affirms that, "it is for the Judge to decide whether a publication is capable of the meaning ascribed to it by the innuendo, and for the jury to decide whether such meaning is truly ascribed." But the defence took another and very different line on the trial, and the case of *Harrison v. Bush*, 5 El and Bl., 344, was relied upon by defendant's counsel as applicable in this case. It was held in that case that "a communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminating matter which, without the privilege, would be slanderous and actionable, and this though the duty is not a legal one but only a moral or social duty of imperfect obligation." And that this rule applies also when the communication is made to a person not in fact having such interest or duty, but who might reasonably be and is supposed by the party making the communication to have such interest or duty.

On the argument, we all thought that the communication in this case fell within that principle, though addressed to the Provincial Secretary when it should perhaps have been, strictly

speaking, addressed to the Commissioner of Crown Lands. And when the learned Judge who tried the cause directed the jury that if they thought the letter referred to was written under the circumstances in proof, and in view of plaintiff's official relation to the Government and the Department of Crown Lands, was written in good faith and written without malice, it was a privileged communication, we think he correctly expounded the law and that his direction was right.

This was the course adopted in *Cooke v. Wildes*, 5 El. & Bl., 329, and it was held that, where in an action for libel the defendant insists that the publication is privileged, it is for the Judge to rule whether the answer creates the privilege. If the answer creates the privilege but there is evidence of express malice whether from extrinsic circumstances or from the language of the libel itself, the question of "express malice" should be left to the jury. Exactly what was done here, and malice negatived by them.

The rule *nisi* must be discharged.

BRUNDIGE ET AL. v. THOMPSON.

PLAINTIFFS, as Trustees of a School Section, had occupied since 1853 a lot of land reserved for them by S. O., who, however, had omitted to give them a deed. In 1871 defendant obtained a deed from the heirs of S. O., knocked down the fence around the lot, and ploughed the land. Plaintiffs proceeded against him for forcible entry and detainer, but the Judge presiding at the trial ruled that in the absence of evidence of violence and terror, the complaint could not be sustained.

Held, That his ruling was correct.

SIR WILLIAM YOUNG, C. J., now, (March 10th, 1873), delivered the judgment of the Court:

This case has arisen out of a dispute among the Trustees of School Section 36, at *Tidnish*, in *Cumberland*, which led to the School-house being burned down by an incendiary in *May*, 1871, and to an entry on the land by the defendant under circumstances that are quite indefensible. The lot—one-eighth of an acre—had been reserved by *Oxley* and occupied by the School-house since 1853, but no title having passed from *Oxley*, the defendant in *March*, 1871, took a deed from the heirs of *Oxley*, which I think they had no power to

give, the possession being in the Trustees, knocked down the fence which two of the Trustees (*Brundige* and *Taylor*) put up after the fire, and ploughed the land with the sanction of the other Trustee, and of *Stephen Oxley*—claiming to be a Trustee, which sanction they had no right to give. When *Brundige* forbade him to take possession of the school land he said he would take it and was going to build a rumshop on it,—a purpose which he did not deny when examined, and it is well for him that he did not carry out.

These parties, and the papers on file, were before me, when at *Amherst* last term, and I was of opinion that *Brundige*, *Taylor*, and *Amos Thompson*—father of the defendant—were the Trustees, and that *Oxley* was not. The matter was tried before my Brother *DesBarres*, on a complaint against the defendant, under chapter 140 of the *Revised Statutes*, for a forcible entry and detainer, and the Judge was of opinion that, in the absence of violence and terror, the complaint could not be sustained.

This question came before us in *The Queen v. Murdoch*, in 1862, and I have looked at the authorities in *1 Hawkins' Pleas of the Crown*, ch. 64; *Fisher's Digest*, 2449; and *Woodfall on Landlord and Tenant*, 935. and am reluctantly obliged to acquiesce in my Brother's ruling, the merits of the case, as they appear on the papers, being all the other way. I trust that the defendant will unite with *Brundige* in conveying this one-eighth of an acre adjoining the piece now selected, to the Trustees, forming a good site for the school, and I express this hope because I think that *Oxley* wished well to the school, though he has got into this fight.

The rule for a new trial must be discharged, but without costs.

HAGGARTY v. PRYOR.*

THE Corporation of Halifax, in making certain street improvements, pulled down plaintiff's porch, which projected across the line of side-walk, whereupon plaintiff sued defendant for damages, he being one of the Aldermen under whose direction the improvements were made. Defendant pleaded in denial and justification. At the trial he sought to introduce evidence to show that previous to the porch being pulled down, plaintiff had agreed to remove it when requested by the city authorities, or to allow them to remove it themselves. Plaintiff objected and the Judge rejected the evidence. Verdict for plaintiff and rule to set it aside.

Held, That there being no plea of leave and licence, the evidence was properly rejected and the verdict should be upheld.

McCULLY, J., now, (March 10th, 1873,) delivered the judgment of the Court :

This was an action of trespass with counts in trover for conversion. The plaintiff charges that defendant wrongfully pulled down his porch, situate on *Pleasant Street*, in the City of *Halifax*. This is the real gravamen of plaintiff's case.

Defendant pleaded several pleas, all of which either deny the commission of the wrongs alleged, or confess and avoid the same. *Stephen*, in his late edition on *Pleading*, pronounces the general rule to be, that the defendant must either demur or plead by way of traverse or by way of confession and avoidance, 7 *Ed.*, p. 195. The parties went to trial on this state of the pleadings, and plaintiff recovered a verdict for \$500 damages.

A rule *nisi* for a new trial was taken under the statute by defendant, and duly argued, the Court confining the argument to the single point, whether or not the learned Judge who tried the cause had rejected evidence tendered upon the part of defendant that ought to have been admitted.

On his cross-examination the plaintiff, who was a witness for himself, was asked a question which he answered as follows :—"I never, either in 1864-5 or 6, promised *Mr. Nash* and the other Aldermen, to remove the porch when requested, but I did promise if the porch fell down I would not put it up again. I offered to take it away if remunerated."

On the defence *John D. Nash* was called as a witness for defendant, and says, line 98, "I had a conversation with the plaintiff respecting the obstruction by the porch." Here the learned Judge makes this entry in his minutes. "Here the

* See N. S. Decisions, Vol. 2, p. 532.

counsel proposed to ask the witness if the plaintiff had not agreed to remove the porch when requested by the city authorities. (Objected to.) And I think the question could not be asked, first because any admission by plaintiff as respects title should be in writing; and secondly, because the plaintiff had not been properly examined on the point to allow him to be contradicted."

The rejection of the evidence, which the answer of *Mr. Nash*, it is alleged, would have furnished, is the groundwork of the present application, and is sufficient, as defendant contends, to warrant the setting aside of a verdict unexceptionable otherwise, and the granting of a new trial.

Now I think the true way in which to regard this matter is this. Had the defendant's counsel not interrogated plaintiff at all upon the subject of pulling down the porch, or removing it, but, in opening his defence, had announced his intention to call witnesses to prove that plaintiff had, before action brought, promised to remove "this porch when requested so to do," and subsequently proceeded to call witnesses to prove his opening, would he have been permitted, if the testimony were objected to on the part of plaintiff, would he have been permitted, *under the pleadings*, as they stood, to prove the fact and set up such a defence? And here it must be remarked, the only pleas on the record were those of *denial* and those of *justification*, but no plea of consent, or leave or licence, which, it seems to me, was indispensable, if defendant intended to rely upon consent given by plaintiff, to allow defendants to pull down the porch, or that the plaintiff would himself remove it when requested.

In actions of trespass, *Chitty* lays it down, vol. 1 p. 528, Lib. Ed. p. 541, that a licence *must be pleaded*, citing 8 *East.*, 308; 2 *T. R.*, 168; *Hale*, 174-5, and 2 *Mod.*, 6 and 7. If without any such pleas on the record, defendant could have gone into proof, that defendant had consented and given him leave to pull down the porch, it seems to me that the traverse taken by him, with justification pleaded, would only operate as a trap or a snare upon plaintiff. Because by no ingenuity exercised, could counsel for plaintiff be supposed to know or even suspect that with such an issue as that described and handed the learned Judge who tried the cause, the

defendant would be permitted to shelter himself under an alleged "consent" on the part of plaintiff to commit the alleged trespass.

The learned Judge may possibly not have given the best, or the only legal reason for rejecting such testimony on such a state of pleading, yet if the conclusion at which he arrived, and the decision pronounced was sound and legal, this Court ought not, and will not set aside the verdict obtained.

Now, assuming as I do, and from what I have advanced, I feel warranted in saying that the question asked of the plaintiff on his cross-examination, in view of the pleadings, was not relevant to the issue, then *Taylor*, sec. 1202, lays down this proposition broadly, "That no question respecting any fact irrelevant to the issue can be put to a witness on cross-examination, for the mere purpose of impeaching his credit by contradicting him, and if any such question be inadvertently put and answered, the answer of the witness *will be conclusive*." See the authorities by him cited, among others that of *Tenant v. Hamilton*, 7 Cl., and *Fin.*, 122, where on a bill of exception, the ruling of the learned Judge who tried cause, was confirmed by the House of Lords.

No evidence in this case having been rejected that under the pleadings ought to have been admitted, I am clearly of opinion that defendant's rule for a new trial should be discharged, with costs.

TREMAIN v. HALIFAX GAS COMPANY.

THE facts were the same as in *Dodge v. Halifax Gas Co.*, p. 325, ante, but in this case the plaintiff was the tenant of the house, and his claim was for injuries to his wife and damage to his own goods, resulting from an explosion. Some further evidence was introduced to show that plaintiff had drawn the attention of defendants' servants to the condition of the pipes some time before the explosion, and that they had assured him they were all right, and that there was no danger. The evidence of contributory negligence on the part of plaintiff was stronger than in *Dodge's* case.

Held, McCULLY, J., dissentente, That the notice given, even if as contended for, was not sufficient to bind the defendants, and that the verdict for plaintiff must be set aside.

RITCHIE, J., now, (March 10th, 1873,) delivered the judgment of the majority of the Court:

This action was brought against the *Halifax Gas Company* by *Lewis E. Tremain*, to recover damages sustained by him

from an explosion which took place in a house occupied by him as tenant of *John H. Dodge*, and a verdict was obtained against the Company, to set aside which a rule *nisi* was taken under the statute. The building in which the explosion occurred was at the time occupied by *Mr. Tremain* as part of his dwelling house, and it had formerly been used as an office in connection with a factory in the occupation of *Wm. L. Dodge & Company* and was the same building for damage to which, by the same explosion, an action was brought against the Company by *John H. Dodge*, the owner, in which judgment has just been delivered by me, (*ante*, p. 325.)

It is not necessary for me to repeat the circumstances which led to the explosion, as the evidence is to the same effect in both cases, except that, on the part of the plaintiff, evidence was given of a notice to a servant of the Company some months previous to the introduction of gas into the premises, which the plaintiff's counsel contend was notice to the Company, and should have led them either to have closed the open pipe by which the gas entered the office, or have given the plaintiff notice of their intention to introduce the gas, so that he might have closed it, and by so doing have prevented the accident, and on the part of the defendants that the evidence was stronger in this case to show want of due care and caution and contributory negligence by the plaintiff and his family.

The plaintiff, when he went into the possession of the dwelling house, of which the office now forms a part, in the end of *April*, 1871, and therefore about five months before the explosion, saw the end of the pipe in the office through which the gas escaped, which occasioned it, un-stopped, and, as he says, pointed it out to a man who had been sent by defendants, at plaintiff's request, to put in a meter for him. The man said to him not to be alarmed, it was secured some other way, and in fact the pipe referred to was not connected with the pipes through which the plaintiff was getting gas, or with the meter the men were then putting up, and this the plaintiff said he himself ascertained by going into the office where the open pipe was and seeing that no gas escaped when gas was turned on to the house. It is also in evidence that on the same day one of the men said to a maid-servant who

showed him the open pipe, that it did not connect with the house pipes. These two men were examined and they stated that they never communicated any such notice to the Company or its officers, and both of them denied that any such conversation had taken place, and the general manager of the Company denied that any information relative to the state of the pipe in question had been made to him.

This is the evidence relied on as notice to the Company. It is not necessary to say what the effect of such notice would have been if it had reached the Company or its general manager. In my opinion an intimation such as that testified to given to a workman employed to do a particular job in relation to a matter unconnected with that job, which he was not called upon to communicate to his employer at the time, and which, four months afterwards, when gas was introduced and found its way through this pipe, he may and probably had forgotten if he ever received it, cannot be deemed notice to the Company, and ought not to bind them. Had it been connected with the business the men had been sent to do, and affected that business, it might have been otherwise.

To constitute constructive notice it must be given in relation to the same matter which the party receiving it is at the time entrusted to do. *Story on Agency*, section 140, &c., &c., *Story* says, "Unless notice of the fact come to the agent in the course of the very transaction, and while he was concerned for the principal, or so near before that the agent must be presumed to recollect it, it is not notice thereof to the principal." If, in this case, notice of the pipes being open had been notified to the workmen sent to introduce the gas on the 2nd *October*, it would have been connected with their job, and ought to be deemed notice to the Company. The principle is well laid down by the Lord Chancellor in *Wylie v. Pollen*, 32 L. J. Chan., 782, (1863.) "The doctrine of constructive notice," he said, "ought not to be extended; in order to affect the principal with notice, the knowledge of the agent must be derived by him in the particular transaction, or be shewn to be then present in his mind, and must be knowledge of something which was material to the particular transaction, and which it was his duty to communicate to his principal."

This evidence, in my opinion, not having the effect of varying the case of the plaintiff from that made out by the plaintiff in *Dodge v. The Halifax Gas Company*, I am led to the same conclusion at which I arrived in that case for the same reasons, and on the same authorities, to which I refer now without again repeating them, that no case has been made out by the plaintiff to enable him to recover, and that the verdict should be set aside.

I may add that there is the greater difficulty in sustaining this verdict, inasmuch as there is evidence of contributory negligence, in addition to allowing the broken pipe to remain unrepaired and unstopped, stronger than in the case of *Dodge*, to which I have alluded. The wife of the plaintiff, on the afternoon of the day on which the explosion took place, perceived the smell of gas in the house two or three hours previous to the explosion, and in consequence tried the burners with a match to see if gas was escaping, she shut the door of the office which had been open, and also the window, and left the house and remained out about two hours; on her return, as soon as she opened the front door, she smelt the gas to such an extent that she placed it open to let in the fresh air, and went herself out on the sidewalk and sent for a neighbour. The gas in the hall which had been lighted, she turned down to a glimmer; before going out in the afternoon she had been in the office and smelt the gas stronger there than elsewhere. On the arrival of *Dodge*, the owner of the house, whom she had sent for, she told him that she thought the gas was from that room, and on his asking her if she would go in with him they opened the door and went together into the room to see if the gas was escaping from the pipe which she knew to be unclosed, as she said she had observed it shortly after she went to the house; very soon after their entry the explosion took place, the gas having escaped through the open door to the hall, into which the room opened, and was ignited by the light there.

Under these circumstances it is difficult to say that the wife of the plaintiff has not contributed to the misfortune by want of due carefulness on her part, and her negligence and careless conduct has the same bearing on the case as if it had been the plaintiff himself, and this not without a suitable

caution from the defendants, for it was in evidence that a gas-book had been furnished by them to the plaintiff for keeping the account of gas consumed by him, which contains this entry, "Regulations to be rigidly observed by gas consumers," and among these regulations is the following in italics, the others are in ordinary print, ' Whenever any unpleasant smell from the gas is perceived, immediate notice is to be given at the works, and every precaution used to prevent any person approaching the place where the gas is accumulating with a lighted candle, especially if the escape is in a cellar or other confined place.

The rule *nisi* will therefore be made absolute.

MCCULLY, J. *dissentiente*.—This was an action brought by plaintiff to recover damages for injuries sustained by his wife, his servant and his dwelling-house, in consequence of an explosion of gas which occurred in the month of October, 1871.

Plaintiff was tenant of a dwelling house rented of one *Thomas Mitchell*, situate on *Pleasant Street*, in the City of *Halifax*, which was supplied with gas from a main, the property of defendants, who are an incorporated company and supply the city with gas, there being no other gas manufactory except, perhaps, some few cases where gas may be prepared by patent machinery for individual dwellings. Adjoining plaintiff's dwelling there was a lane leading from *Pleasant Street* to a factory in the possession of *Mr. J. A. Dodge*, which was situate at the further end of the lane a short distance from plaintiff's dwelling. This dwelling-house and factory had formerly belonged to one *W. L. Dodge*, who became insolvent and gave up possession of both factory and house some nine or ten months before the explosion referred to. While in his possession, however, and before his insolvency, he had procured the defendants to lay down an iron pipe or small main from *Pleasant Street* along and under the lane referred to, and to the factory, which supplied it with gas. There was one room of this dwelling of plaintiff's adjoining the lane, which *W. L. Dodge*, the former proprietor, had used as an office, and when he had the gas introduced into the factory, by defendant company, by a short branch

from this lane pipe, (which he also procured defendants to lay down under ground, to the outside wall of the room or office) he had it, by a short bent composition pipe coupled or attached to the iron pipe, and passed up and through the side of the dwelling house to the office supplied with gas.

In the autumn of 1869 or early in the year 1870, this *W. L. Dodge* became insolvent, and thereupon on the 20th *January*, 1870, defendants entered the premises and removed all the gas meters, that is to say, the meter which supplied the house, the one supplying the factory, and the meter supplying the office, and, at the same time the gas was turned off the lane pipe. The premises were sold by the assignees of *W. L. Dodge*, and *J. A. Dodge*, a brother of *W. L. Dodge*, became the purchaser. In the mean time, and while vacant, the house and office, so called, as part of it, was let by one *George Mitchell* to plaintiff who, on the 28th or 29th day of *April*, 1871, applied to defendants to turn on the gas. This was done by a street stop-cock, and defendant's workmen, *Lawrence* and *Weymiss*, came, bringing one of their meters, which was attached to the pipes that lighted the house, all except the part called the office, plaintiff finding his own fixtures. The office had at some previous time been lighted by the same meter as the house, but for reasons not explained nor material, a change had taken place before the lane pipe was laid, and the pipes to the office closed and soldered up. When plaintiff procured defendants to put in their meter and connect with their main on *Pleasant Street*, he testified to having called the attention of one of the company's workmen to the condition of the pipes in the office,—one in the ceiling, the other in the corner, apparently unsafe, there being no stop-cock inside, and exhibited appearances, it would seem, of being in a condition to let gas in. The workman replied, "not to be alarmed about these, they were secured some other way." It was proven that, notwithstanding defendants when they removed the meters in *January*, 1870, had closed up this pipe in the corner, the ceiling pipe was soldered in the most safe and approved manner, yet, in the interim, and while the premises were vacant, that is, between *November*, 1870, and *April* 29, 1871, by some party unknown, the composition pipe within the office had been jaggedly cut and wrenched off,

and the couplings of defendants, and the pipe, or a portion of it not defendants', detached and carried away. On this point a *Miss Purdy*—a servant-maid in the employ of plaintiff—also testified to having pointed out this open pipe to defendants' workman while engaged attaching the meter to the house pipes proper, substantially as sworn to by plaintiff, and with the reply nearly *verbatim*.

The evidence of plaintiff and his witnesses was controverted by defendants' workmen, and there were discrepancies and contradictions between them. The defendants, when they removed their meter in *January*, 1871, left the end of the pipe in this office as safe as it could be made, there is no room whatever for doubt. But they did more, they turned off the gas on *Pleasant Street* so that it could not go down any longer to the factory, where they also secured the pipes. For reasons hereafter pointed out this, I think, and especially their turning it on as they did, is of great importance. The explosion took place on 2nd *October*, 1871, and in this wise: *J. A. Dodge*, the present owner and occupier of the factory, purchaser after his brother's insolvency, having occasion for gas in the factory, applied in the usual way to be supplied. The defendants, having made their arrangements for this purpose by supplying a meter, etc., turned on the gas into the lane pipe, and the branch entering plaintiff's house being open in consequence of some party unknown having removed the couplings and preventives placed there on the previous *January*, there being no stop-cock the gas rushed into the office, and when plaintiff's wife and the witness *J. A. Dodge* were searching for the place of its escape, having opened a door from the hall of the house, at the further end of which hall a burner turned partly down was lighted, the gas escaping along the hall ignited and exploded, causing the injury to plaintiff's wife, family and dwelling.

The question in this case—taking the whole of the evidence together—and I have given but a very brief abstract of it—the real question is, were the defendants justified in turning their gas upon plaintiff's premises, or were they not guilty of negligence? Was there evidence sufficient to warrant the sending of the case to a jury? If there was not, the plaintiff should clearly have been non-suited. If there

was, then, as it appears to me, this verdict cannot be set aside unless for excessive damages. It would be a contradiction in terms, to commit a case to a jury on sufficient evidence, and then set their verdict aside on the ground that there either was no misfeasance, no negligence, or that the misfeasance or negligence was not of the kind or character that warranted finding. If the jury erred in the amount or extent of damages found, then another principle intervenes, and that, as remarked, is as to excessive damages.

With these observations, I now proceed to examine the law and decided cases applicable. But first I turn to a text-book of acknowledged authority—*Addison on Torts*, p. 244, where he treats of negligence, and groups the causes of a certain class of injuries, thus: "injuries from *gunpowder* and *explosive* substances, *explosions* of gas," and adds: "whoever introduces gunpowder or explosive materials into a building, is responsible for damage occasioned by the introduction of such dangerous substances."

Now, this principle, to my view, underlies and decides this action, and I am clearly of opinion that, in proportion as any given substance is dangerous, explosive, and requiring extraordinary care in its manufacture or management, so those manufacturing or managing it, are required to use corresponding or more than ordinary care, to protect themselves from the charge and consequences of negligence. With the exception of the case of *Burrows v. The March Gas Co.*, L. R., 7 Ex., 86, and *Mose v. The Hastings Gas Co.*, 4 Fos. & Fin., 324, *Addison* has collected all the reported *English* cases bearing on the subject and pithily presents them at page 244.

In this case there was no evidence—not the slightest, that plaintiff so much as knew or had ever heard of the existence of the lane pipe running down to the factory from *Pleasant Street*, nor of the branch thence to his dwelling house, and that part called "the office." Defendants knew it. But their defence is that they, on the 20th day of *January*, 1870, had carefully closed the aperture when they removed the meter. If, having done this, and having also turned off the gas at the main where it entered the lane pipe, (without reference to the conversation of the plaintiff and *Miss Purdy* with the workmen

and their alleged pointing out the open pipe, that is, supposing no such conversation to have existed,) if after the lapse of time between *January* and *October*, they could turn on the gas into the lane pipe and thrust it into plaintiff's premises, up to the very point of the stop-cock, supposing it still to be there, without his consent, without informing him of what they were about to do, and an explosion results in consequence of the absence of the stop-cock, and yet not be guilty of such conduct as would justify the case being put to a jury, then I am free to confess that I may have misapprehended the law on this point. The only evidence of negligence on their part then would be, if the jury believed the plaintiff and his witness, in preference to *Weymiss*, defendants witness, and *Lawrence*, with reference to the alleged conversation. If, however, there was no evidence for the jury on either branch of the case, as already remarked, plaintiff should have been nonsuited. But, in the case of *Mose v. Hastings and St. Leonard's Gas Co.*, as referred to in *Fisher's Digest*, 4192, and for which Baron *Pollock* is given as the authority, a gas Company is held bound to keep up such a reasonable inspection of their mains and pipes as may enable them to detect when there is such an escape of gas by fracture or imperfection of pipes, as may lead to danger of explosion. This imports great watchfulness, care and vigilance where no skill or memory is concerned.

Had the defendants not turned off this gas at the main when they removed their meter, the gas would have escaped the moment the pipe within the house was severed. But having turned it off at the main, at that time, and thus withdrawn it entirely from this room or office, they had no right nor authority, as it seems to me, to turn it on again, and *nolens volens* introduce it upon plaintiff's premises as they did do, whereby the accident occurred. It was the act of defendants that was the immediate cause of the disaster, and knowing as they did, and were bound to know, that gas turned into this lane pipe could and would pass into plaintiff's premises, already supplied as to the house, by themselves with gas, and bearing in mind, as they should have done, that gas let on at the iron pipes went into the composition pipe as far as the stop-cock, had it remained unremoved, what right had

they thus to flood plaintiff's pipes without his consent with their gas? So far from requesting it, plaintiff was not aware that they had the power or means of doing what they did. And then having done an act clearly unauthorized by plaintiff, which brings about an explosion, unintended, accidental, if it can be so called, is the plaintiff to suffer and have no redress? Suppose plaintiff had been in the act of repairing or removing the pipe at the very time, had he not the right? And had defendants just then turned on the gas and produced the explosion, would they not be liable? If not, why not? *Broom* in his *Legal Maxims*, p. 275, says: "A man must enjoy his own property in such a manner as not to invade the legal rights of his neighbor. *Sic utere tuo ut alienam non laedas.*" And he follows it up with cases and illustrations. Now, that is exactly what defendants did not do, use their own gas without injuring their neighbor, for they so used their gas that they invaded the legal rights of plaintiff. They caused him an irreparable injury—without his consent expressed or implied. They had no right, I maintain, to invade his domicile with even the smell or scent of gas, and still less *his* gas pipes with *their* gas. *Broom* adds: "In all civil acts our law does not so much regard the intent of the actor as the loss or damage of the party suffering. In *Tress. qu. cl. fr.*, defendant pleaded that he had land adjoining plaintiff's, close, and upon it a hedge of thorns—that he cut the thorns and they, *ipso invito*, fell upon plaintiff's land, and he, defendant, took them off as soon as he could, &c., which was the same trespass, &c. But on demurrer, judgment was given for plaintiff, for that though a man do a lawful thing, yet if any damage befall another he shall be answerable, if he could have avoided it." Here defendants could easily enough have avoided the mischief by a stop-cock at the side of the same pipe, adding "if a man top a tree and the boughs fall upon another, *ipso invito*, yet an action lies. So, if a man shoot at a butt and hurt another unawares, an action lies." This is ancient law learning, but rich in sound reason, nevertheless, and, as it seems to me, it entirely covers the question in controversy in this case. Defendants could have supplied *Dodge's* factory with gas without flushing the pipes of plaintiff with the dangerous fluid. At any point of

the three or more feet from the iron pipe leading to the factory from the street on the branch, and before it entered plaintiff's premises, they could have stopped the flow of gas. Their excuse or defence for turning gas into plaintiff's premises is, that if they had remained in the condition left by defendants, in the previous *January*, no accident could have happened. But to use the language of *Addison*, in his Text-book, p. 244, "A thief had entered in the absence of the tenant, and cut and carried away the gas pipe, without the knowledge of the tenant, or against his will, and he, the tenant is, therefore, not responsible for the damage." But trusting or speculating upon the probability that this gas pipe entering the office was, in *October*, 1870, in the same safe condition they had left it in in *January* of the same year, defendants turned the gas on the lane pipe, knowing at the time that it must of necessity fill the plaintiff's pipe, if as so left, and by accident or otherwise not being so as left it, the gas filled the room and exploded within plaintiff's domicile.

I shall now turn to some of the most recent *English* decisions on the subject of negligence. In *L. R., 5 Q. B., 411, Kearney v. London and Brighton Railway Co.*, the Court held that there was *prima facie* evidence of negligence—a brick having fallen from defendants railway bridge upon a passenger passing along a highway, although there was no special negligence in constructing the piers imputed to defendants, nor in omitting to keep them in proper repair. In *Sheppard v. The Midland Railway Co.*, 25 L. T. Rep., 879, plaintiff, while waiting for a train on defendants' railway, was walking by daylight in *December* up and down the platform of one of their stations. A strip of ice near by, an inch thick, extended half-way across the platform, and plaintiff slipping on the ice, fell and sustained injuries, in respect of which he now sued for damages. The presence of the ice was unexplained. *Held*, there was evidence for the jury of negligence on the part of defendants. In *Welfare v. London and Brighton Railway Co.*, 23 L. J., N. S., 712, it is laid down that a question of negligence turning upon the nice distinction of what is and what is not reasonably safe, is one emphatically for the jury, on all the evidence before it, and the Court will not disturb its finding. *L. R., 6 C. P., 14; 23 L. J., N. S., 678,*

was a case where defendants' servants cut grass on the banks of the line and left it for fourteen days, in hot, dry weather. Soon after passing of a train fire broke out in the grass, extended up the bank to a bridge, crossed a stubble field and road to plaintiff's cottage. A high wind was blowing, and the cottage was 500 yards from where the fire broke out. *Held*, affirming C. P., that there was evidence of negligence, and, if so, it was no answer for defendants to say the damages were greater than could be anticipated.

It was contended on the argument there was evidence of contributory negligence. I saw none. I can find no ground for such a proposition. Had the explosion resulted from gas legitimately supplied by defendants to plaintiff, then their blue-book and its rules might possibly apply. In the present case they had no application, for obvious reasons. It is said the damages are excessive. They are large—more than I, as a juror, probably would have given; but, that point was not pressed much at the argument. Recent *English* decisions would not warrant interference on that ground. Having no right to turn gas into plaintiff's premises, or into his gas pipes without his authority, the act of flushing them was, in the eye of the law, an act of trespass. If defendants could, unauthorized, fill a foot of plaintiff's pipe, they could fill a thousand; the principle is the same. They could do neither, to my mind, and do it at their peril. Defendants' contention was that plaintiff should have closed an open gas pipe within his dwelling, patent to his eye; but, if he was not aware it connected with any pipe in the lane or elsewhere, that could cause mischief or trouble, and he does not do it, does his non-feasance justify defendants invading his (plaintiff's) premises with their gas? Supposing it was an act of trespass to do so, as I think it was, still I was and am of the opinion, as I told the jury, that after six months after defendants removed their meter, till they proceeded to turn on the gas in the street, a careful, prudent manager would have examined the pipe in the plaintiff's premises. He would be a trespasser, it was said, if he offered to do so. That is more than doubtful, for he went there unbidden, for ought that appears, to remove the meter, and he left couplings on the end of the pipe to be used in case of the meter being replaced.

But, if the jury believed plaintiff and his witness in preference to defendants witnesses, had they not the undoubted right to do so? In that case defendants workmen's attention was called to the dangerous condition of the pipe in the office in May. They lulled plaintiff into a kind of fatal security by their answer, and for six months more, the results justified their reply to plaintiff and *Miss Purdy*.

But, defendants then do an act which brought down ruin and mischief upon plaintiff. *Addison on Torts*, 979. Now it is said, notice, if given to these workmen, the servants of defendants, whom they employ at the very kind of skilled work which was required to close the open pipe, is no notice to defendants. The current of authorities, I maintain, is all the other way, and if it were not so in these days when incorporated companies abound, and their servants only are accessible for such purposes, all would be a sea of uncertainty. *Respondiat Superior*. *Story on Agency*, sec. 308.

But upon this point, if doubt existed, I found on reference to defendants original *Charter of Incorporation*, passed 27th March, 1840, and the 16th section, there is a very unusual clause inserted in specifications, fixing upon this Company and its shareholders all the "responsibility, duty or obligation of common law, as if the act had never been passed." Their liability as a corporation, therefore, is precisely the liability of every man in the community, and when a notice to his servant in his employ, touching subjects within the scope of his employment, would be notice to the master, it would be so in the present case. Reference, therefore, to words on Corporations on that view as authority, is needless.

In conclusion, I hold these defendants are clearly proven to be the proximate and immediate cause of the explosion, by an unauthorized act of turning their gas into plaintiff's pipes. And here this case differs entirely from the case of *Holden v. The Liverpool Gas Co.* 3 C. B., 14. They there turned on no quantity of gas, causing the mischief, as was the case. Had defendants then had a stop-cock outside on the pipe and turned on the gas causing the explosion, then the case would be largely a parallel, and the decision would be the same. But without these there is no similarity that I can recognize at all. The distinction between the cases

seems to me, obvious. Defendants are liable, I hold, first, as trespassers in throwing down along his own pipes a dangerous combustible fluid, such as gas, and thence into plaintiff's pipes, when it was in the defendants power to prevent it,—whereby the explosion described took place, and plaintiff's wife, &c., was injured. Secondly, they are liable for not ascertaining before turning on the gas, that plaintiff's pipes were safe, so as to prevent escape into his dwelling, by this old branch from the lane pipe, which they, defendants, had introduced for a previous proprietor, though safely closed in *January*, 1870. I think that here defendants did not exercise that careful and prudent forethought the law devolves upon them. And thirdly, with the contradictory evidence before them, if the jury, under all the evidence, chose to prefer plaintiff and his witness to defendants witnesses, I think it was their prerogative so to do, and for these and other reasons I need not here repeat, I am of opinion that defendants' rule nisi should be discharged.

THE QUEEN ON THE RELATION OF ROBT. FRASER, ET AL.

v.

NEWELL SNOW, DAVID A. McDONALD AND THOMAS
H. HOWARD.

THE relators in this case sought to have a lease granted by the Crown, of certain gold mining areas set aside, on the ground that it had been granted, improvidently and in derogation of relators rights. They had taken out a lease in April, 1862, but were in arrears for rent thereon in February, 1863, when a new lease was taken out, and some rent paid on its account, but none of the rent then over-due paid. After working on the areas for a month all operations were discontinued, and in October of the same year the Gold Commissioner declared the lease forfeited, and granted the areas to other parties. This lease also being forfeited another lease was granted to third parties in 1866, and in 1868 the relators sought to have this lease set aside, alleging that they had been misled as to the law by the Deputy Gold Commissioner, but this was contradicted.

Held, That the relators had not shown any ground for the lease being set aside, they having forfeited all claim to the areas, and that in any event they were too late in applying for relief.

RITCHIE, J., now (May 19th, 1873,) delivered the judgment of the Court:—

The information in this case, is by the *Attorney-General*, on behalf of the *Queen*, on the relation of *Robert Fraser* and

others, members of an incorporated joint stock company known as the *Middle River Union Gold Mining Company*, against *Newell Snow*, *David A. McDonald* and *Thomas H. Howard*, and seeks to set aside a lease of a mining area at *Sherbrooke*, made to *David A. McDonald*, and by him assigned to *Newell Snow*, as having been made improvidently and in derogation of the rights of the relators holding an equitable title under Her Majesty, which Her Majesty's officers were bound to respect.

The relators found their rights to the area in question on an application made in *April*, 1862, by one of them, *Alexander Murray*, who made application for a lease of it in his own name, but on behalf of the Company, and paid one quarter's rent, which the law required to be paid in advance, and then entered into possession.

The Company at once commenced working on the area, and continued to do so, digging and crushing quartz and extracting gold, till the first of *January* ensuing, having in the meantime put up a small building on it, in which the men lived.

At the expiration of the first quarter, the Company paid a second quarter's rent, after which no further payment was again made on this application, either as rent or royalty. On the 6th *February*, 1863, application was made for the same area by *James Reed* and *Alexander McLean*, with the concurrence of *Alexander Murray*, designating it on the application as formerly "*Alexander Murray's*." The arrear of rent was not then paid, but a quarter's rent in advance was paid by the applicants, *Reed* and *McLean*.

The area was worked by the Company throughout the month of *February*, 1863. At the end of that month they stopped work, as they found it was not paying. From *February* to *May* or *June*, 1864, no work was done on the area, no returns made, and no rent or royalty paid. There had been a meeting of the Company on the 27th *January*, 1863, when it was resolved that the work should be carried on for a month, of which there is an entry in the book of the Company, but after the discontinuance of the work, though there are said to have been meetings, no record of them or minutes of what took place at them appear in the book.

Robert Fraser, one of the Company, testifies that about the last of *September*, or about the 1st of *October*, 1863, he saw a notice which had been posted up at *Renfrew*, calling upon parties to take out their leases by the 30th, or they would forfeit their right to them; this he communicated to some members of the Company, and he was by them sent to *Sherbrooke* to comply with the terms of the notice, and on his applying to *Mr. Pye*, the Deputy Gold Commissioner, he was told that the right to the area had been forfeited, and that it had been applied for by other parties. This was in the early part of *October*. Application was then made to the Gold Commissioner for a lease without success. Subsequently the Legislature was petitioned for redress, but none was afforded.

Murray, in *May* or *June*, 1864, went upon the area and commenced to work, notwithstanding the resistance of the then lessees, and took out \$175 worth of gold, after which it was left and nothing further was done by the Company, with the exception of another unsuccessful application to the Legislature, till this information was filed in *December*, 1868.

It was not, and indeed could not have been, contended that the relators complied with the requirements of the law, on their several applications for a lease, and if a lease had been actually granted to them it would have become liable to forfeiture, but it was contended that they had been misled by the Deputy Gold Commissioner, who had informed them that he would give them notice if the area should become liable to forfeiture by any change of the law or otherwise, and that when they had applied for a lease before a default on their part, it could not be obtained, and though they might not have had a strictly legal right to a lease, they had such an equitable one as the Deputy Gold Commissioner should have respected.

Mr. Pye, the Deputy Gold Commissioner, substantially denies the statement of the relators who testify on this point. He says the lease could have been obtained by the applicants on going to his office and signing it, which they never did. He says that one of the members of the Company, in *February*, 1863, (*McLean*) asked him if there was any danger of the area becoming forfeited before his return to resume

work, and he told him they were just then enacting laws on the gold mines, and if the area became forfeited before the 1st *June* under the provisions of the new law, he would give him a written notice, the reply to which was that he or some one would be back before that time to look after the lot and commence work, and *Mr. Pye* says he told *McLean* the lot would be forfeited on the 1st *June* unless the quarter's rent was paid, provided there was no change in the law.

Printed notices had been posted at *Goldenville* and *Sherbrooke*, calling upon parties to make the returns as required by law before the 1st *September*, and on the 1st *October*, 1863, application was made for a lease of the area in controversy by *Alexander* and *D. McDonald* and *Harvey Howard*, which was granted, and they held under it two years. As these parties did not comply with the provisions of the law for the second year, *David A. McDonald* applied for and obtained the area on 20th *November*, 1865, and it having become liable to forfeiture for non-performance of the required amount of work, he put in a new application on the 8th *December*, 1866, and obtained a lease, which is that now sought to be set aside as having been improvidently granted.

On the 4th *July*, 1867, *Newell Snow* made a purchase of part of the area from *David A. McDonald*, on behalf of the *Wellington Gold Mining Co.*, of which he was agent, the other part of it having been previously sold to the *Rockwell Gold Mining Co.* Subsequently, under arrangements between the two last-mentioned companies, the lease to *McDonald* was surrendered and a lease was taken out by the *Wellington Gold Mining Co.* on the 12th *October*, 1867, and the part purchased by the *Rockwell Co.* was subsequently transferred to them; so that both these companies now hold under this grant.

There is nothing in the evidence to indicate that the title so acquired was acquired otherwise than in the strictest good faith, and we are now to consider whether the relators have shown such a right to the area as will warrant the Court in deciding it should be invalidated as having been obtained illegally and in derogation of their just rights.

If a lease were given to a person, after a prior application had been duly made by another who had fulfilled all the

requirements of the law, such lease would have been made in derogation of the rights of the prior applicant; but where such prior applicant has failed to comply with the provisions of the law he has no right, legal or equitable, to claim a lease.

The relators, when they made a second application for the area in question, owed three quarters' rent on their former application, which they have never paid. They paid a quarter's rent on the second application, and before the area was granted to other parties they had both failed to pay rent or royalty and to make the necessary returns as required by law. On their renewed application, they were therefore, in my opinion, not in a position to insist on a lease being granted to them.

If the evidence of the relators relative to the statements and promises of *Mr. Pye*, upon which their case mainly rested, had been uncontradicted, I should still have felt bound to hold that the present lessors would not have been affected by them. They have acquired rights under the law, having acted in all respects in accordance with its provisions, and these rights could not, in my opinion, be affected by the claims of parties who admit that they have failed to comply with such provisions, and who do not pretend to have a legal right but a merely equitable one arising out of their alleged ignorance of the law, and of their having been misled by the verbal statements and promises of the Deputy Gold Commissioner, of which the subsequent lessees had no knowledge.

It is important to advert to the delay on the part of the relators in taking legal proceedings to assert their rights. If they had any their course should have been at once to proceed, by information or otherwise, to have the lease granted to *Alexander and D. McDonald and Howard*, in October, 1863, set aside, instead of waiting for five years, till several successive leases had been granted, and in December, 1868, ask the Court to set aside a lease granted in 1866, which had been surrendered previously to the filing of their information, and a lease of the area in question had been granted to the *Wellington Gold Mining Co.*, not a party to these proceedings, under which it is now held, and which last-mentioned lease is not sought to be set aside as having been improvidently granted.

Mr. James, at the argument, relied much on the objection that the lease to *Alexander* and *D. McDonald* and *Harvey Howard* was void, as having been made, as he contended, while the relators were in possession of the area. I am not prepared to say that where a party had made an application and paid the required rent in advance, but had not taken out a lease, and had subsequently left because the mine was not found to pay, and had neither paid rent nor royalty, the Gold Commissioner would not have been justified in leasing the area, though there might be left a building on it of the character described in the evidence in this case, but whatever consideration that objection would have been entitled to if the proceedings had been taken to set aside the lease to the *McDonalds* and *Howard* in 1863, it can, I think, have none on the lease made to *D. A. McDonald* in 1866 and to the *Wellington Gold Mining Co.* in 1867, as the Crown had acquired full possession of the area before they were given.

I think the relators have altogether failed to show that the prayer of the information should be granted.

DECISIONS
OF THE
SUPREME COURT OF NOVA SCOTIA,
DECEMBER TERM, 1873.

ADAMS v. MCFARLANE ET AL.

C. being largely indebted to plaintiff, an agreement was entered into in December, 1869, that on or before May 1st, 1870, all accounts should be settled and adjusted between them, and that then C. should pay to plaintiff the full amount found due to him on such adjustment in three and six months from the said May 1st. It was further stipulated in the agreement that in event of C. failing to adjust and settle the accounts on or before the day mentioned, then plaintiff might cause an adjustment to be made by one F. by May 15th, or as soon thereafter as the same could be completed, which adjustment should be as binding upon the parties as if made by them in person, and the amount found due thereon to be paid as before stipulated. The performance of this agreement, on the part of C., was guaranteed by the defendants without any limit being stated as to their liability thereunder. No adjustment of the accounts being made in December, 1869, C. and one of the defendants sought, in April, 1870, to effect a settlement with plaintiff, but could not succeed owing to plaintiff's conduct, and on May 10th the whole matter was handed over by plaintiff to F. who, however, was prevented from giving his immediate attention to it, and did not make his award until December 22nd, 1870, when he found that there was due to plaintiff the sum of \$10,924.00. Plaintiff having sued defendants on their guarantee, they pleaded fraud and misrepresentation, and that plaintiff had, by his own conduct, released them from their liability. In support of the first defence they introduced strong evidence to prove that at the time of the signing of the guarantee plaintiff had largely underestimated the amount of C.'s indebtedness to him, in order to induce them to enter into the guarantee. This plaintiff denied.

Held, That whether or not plaintiff had deceived them as to the amount of C.'s indebtedness to him, they were relieved from all liability under the guarantee, because he had by his own conduct so delayed the adjustment between himself and C. as to materially alter their position, the agreement being that on the amount being ascertained C. should pay plaintiff in three and six months from May 1st, whereas F.'s award was not made until more than the six months had fully expired, and this delay discharged the defendants.

The declaration was so framed as to allege that defendants, as sureties, were liable to pay to plaintiff in one sum, on the 22nd December, what by the agreement declared upon, and whose performance they had guaranteed, C., their principal, was bound to pay in two sums on 1st of August and 1st of November, respectively. It also contained a count on an account stated. Defendants demurred to the whole declaration.

Held, That there should be judgment for the defendants on the first count, and for the plaintiff on the second.

YOUNG, C. J., now, (December 20th, 1873,) delivered the judgment of the Court:—

This case was argued before us during the last Term on a demurrer to the declaration and on a rule *nisi* for a new trial.

The defendants are sureties, and a verdict passed against them at *Amherst* for the full amount of the plaintiff's claim, being the sum of \$10,924.60 awarded to him under an agreement made between the plaintiff and *George W. Cutter*, for the performance of which by *Cutter* the defendants gave a contemporaneous guarantee in writing. The plaintiff was the agent of *Cutter* at *Portland*, in the State of *Maine*, for the disposal of his grind stones, and in *December*, 1869, the plaintiff claiming a considerable sum to be due to him, attached certain property of *Cutter* in *Maine*, and in *Boston*, which he surrendered on the agreement and guarantee being entered into. The agreement, after reciting these facts, and that the plaintiff would discount half of the compensation due him for a certain defined period, provides as follows :

"That he the said *Cutter*, on or before the first day of *May*, in the year of our Lord one thousand eight hundred and seventy, will adjust and settle all the mutual accounts pertaining to the aforesaid business between himself and said *Adams*, including interest and services and expenses, taking the annexed statements of disbursements and collections as correct to this date, and will pay to the said *Adams*, his executors, administrators, or assigns, the full amount that shall be found due to him the said *Adams*, upon such adjustment and settlement of accounts as aforesaid, less one-half of the amount for his said *Adams*' services since *January* 1st, A. D. 1868, as ascertained and computed on such adjustment in three and six months from said first day of *May*, A. D. 1870, with interest."

It then stipulates for the giving up of certain acceptances to *Adams*, on which no question arises, and proceeds thus :

"And the said *Cutter*, in consideration of the premises, further contracts and agrees to and with the said *Adams*, his heirs and administrators, that in case he the said *Cutter* shall neglect or fail to comply with or perform his aforesaid contract and agreement to adjust and settle the accounts aforesaid, on or before the first day of *May*, A. D. 1870, then the said *Adams* may cause a statement and adjustment of the said accounts to be made by *Daniel W. Fessenden*, of *Portland*, by the fifteenth day of *May*, A. D. 1870, or as soon thereafter as the same can be completed, who shall proceed without other

notice to him the said *Cutter*, and whose adjustment shall be as binding upon the parties hereto as if made by them in person; and that he the said *Cutter* will pay or cause to be paid to said *Adams*, his executors, administrators, or assigns, the amount found to be due on such adjustment, less the discount on the amount due for services rendered since *January 1st*, A. D. 1868 as aforesaid, in three and six months from said first day of *May*, A. D. 1870, with interest from that date."

Adams then agrees as follows :

" And the said *Adams*, in consideration of the premises and of the guaranty of the performance of said *Cutter's* aforesaid contract and agreement by *Alexander McFarlane* and *A. W. Masters & Co.*, to use all due and reasonable diligence in the collection of any sums now remaining unpaid for stone sold by him as agent aforesaid and to pass the amount received to the credit of said *Cutter*, and to produce all his books and accounts as aforesaid, and to surrender his said agency, and does hereby relinquish his said attachment of the property of said *Cutter*, and discontinue his aforesaid action at law against said *Cutter*, and surrender and give up his lien upon all grindstones and other chattels of said *Cutter*, now in the hands or under the control of him the said *Adams*." Upon the same day, the 15th *December*, 1869, the following guarantee was signed :—

" In consideration of the within consideration and agreement for the settlement of the affairs and mutual accounts between '*George W. Cutter*' and *Sumner Adams*, we hereby guarantee to said *Adams*, his executors and assigns, the performance of all and singular the promises and agreements within contained on the part of said *Cutter* to be done and performed; hereby waiving all demand and notice to us or either of us.

In witness whereof we have hereunto subscribed our names this fifteenth day of *December*, A. D. 1869.

(Sgd.) ALEX. MCFARLANE,

(Sgd.) A. W. MASTERS & Co.

Witness, (Sgd.) W. WEBB."

The suit was brought 27th *January*, 1871, and came on for trial before Mr. Justice *Ritchie*, 21st *August*, 1871, when the plaintiff *Adams*, *Calhoun* and *McFarlane*, two of the defendants, and *Cutter* were examined, and the papers put in evidence. The fifth plea alleges that the guarantee was obtained from the defendants by the fraud and misrepresentations of the plaintiff, and this, as appeared upon the trial, turned chiefly upon the amount of his claim. He alleged that he stated the amount at the time as about \$13,000, and that the balance of \$2,500, as made out from the books, and appearing in the annexes to the agreement, excluded some of the most material items, and included stone sold but not paid for. He denies that he ever told the defendants or *Cutter* that the balance due him was not more than \$3,500, or at the outside \$4,000, but on the contrary he told *Calhoun* before the security was signed that there would be \$13,000 due him on a full settlement. In all this he is expressly contradicted. *Calhoun* took the statement of \$2,515 from the plaintiff's books, which both the plaintiff and *Cutter*, he says, admitted to be correct, and understood that it was not to be substantially varied. He asked plaintiff what he thought the full amount would be, and plaintiff said he thought not more than \$3,500 or \$4,000. Plaintiff made the same statement to *McFarlane*, who said: "If you do not think the amount will be greater, then we will guarantee it." The amount of \$6,000 or \$8,000, uncollected for stones sold, *Calhoun* never heard of till plaintiff stated it in Court. On his cross-examination *Calhoun* says he told plaintiff he would advise *Cutter* rather than have further trouble to pay him \$5,000. *Calhoun* mentioned this to *Cutter*, who said no—there was no such amount due. *Cutter* confirms this as his estimate, and never heard plaintiff claim \$13,000 or any larger sum as the probable amount due him. *McFarlane* testifies that plaintiff told him he thought from \$3,000 to \$4,000 was due to him. *McFarlane* said that at any rate that amount would cover it. The plaintiff said yes. *McFarlane*, before signing, said to plaintiff: "If the amount does not exceed the amount you name I will sign." He adds that the whole amount of stone handed over did not meet *Adams'* acceptance—he never received one dollar—had to pay a draft for \$1,600, and has received nothing since.

It will be seen from this evidence that the extent of the guarantee is a very material inquiry, to which I shall hereafter revert.

It appears further from the minutes that no adjustment of the accounts having taken place in *December*, *Cutter* and *Calhoun* returned to *Portland* in *April*, 1870, with the expectation of effecting a settlement, but did not succeed. There is contradictory evidence also upon what *Calhoun* did at this time. *Adams* says that *Cutter* and he could not come to a settlement, and were engaged at it a great part of two days. *Calhoun* says that they asked plaintiff for the accounts over and over again and could not get them. They remained two days, and plaintiff said he thought the matter would have to go to *Fessenden*. *Cutter* says they made every exertion in their power to get the account adjusted, but could not.

Finally the whole matter was handed over by *Adams* to *Mr. Fessenden* about the 10th of *May*. He (*Fessenden*) was prevented by his official duties and the illness of his family from taking it up, although repeatedly urged to do so by plaintiff, and at length, after having been attended upon by *Adams* and *Cutter* and their counsel, made his award in favor of plaintiff for the sum of \$10,924.60.

This award having been made after hearing *Cutter* and his counsel, and apparently in good faith may be binding on him. The question is whether it is also binding on the defendants, considering the period at which it was made and the amount so largely exceeding what, as they have testified, they were led to expect.

The balance that should be found due by *Cutter* on the adjustment was to be paid by him in three and six months from *May*, 1870, with interest from that date, and these were the two payments guaranteed by the defendants. But on 1st *August* and 1st *November*, 1870, when they were to have been made, no adjustment had taken place.

The agreement provided that the adjustment, if it went to *Fessenden*, was to be made "by the 15th day of *May*, 1870, or as soon thereafter as the same can be completed." Does this extend to the 22nd of *December*, 1870, with a continuing liability of the defendants, whose relations to *Cutter* and his own position and circumstances may in the meanwhile have

entirely changed? Then again did the plaintiff fulfil his duty to the sureties, and is he in any way responsible for the delay?

With a view to these inquiries let us look at some of the principles and cares in this branch of the law. In construing the guarantee, as is the rule with other instruments in writing, we must look to the surrounding circumstances, to the subject matter which the parties had in contemplation when the guarantee was given—not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the instrument given. *Heffield v. Meadows*, 4 L. R. C. P. 590. “We ought to look,” says *Bayley, B.*, “at the surrounding circumstances to see what the contract really was.” *Simpson v. Renton*, 2 N. & M., 52. If the language of the surety is ambiguous, it is to be taken most strongly against himself. *Broom’s Maxims*, 575; *Fraughton v. Ryerson*, decided in this Court in 1870; 6 Bing., 244. The contract being *stricti juris*, or as some jurists declare it, being *strictissimi juris*, has to be examined with reference to the subject or amount for which the surety makes himself liable, the persons for whom and to whom he engages to be liable, and the time during which he engages to continue liable. *Burge on Suretyship*, 46. The contract is to be construed, if not strictly, accurately. *Parsons on Contracts*, I., 495. Now for a few of the cases. *Bacon v. Chesney*, 1 Stark. R., 192, per Lord *Ellenborough*: “The claim against a surety is *strictissimi juris*, and it is incumbent on the plaintiff to show that the terms of the guarantee have been strictly complied with,” and in a note thereto, per *Buller, J.*, “As against a surety a contract cannot be carried beyond the strict letter of it.” *Straton v. Rastall*, 2 T R, 370; also *Glyn v. Hertel*, in the same words per *Dallas, J.*, 8 Taunt., 208; *Evans v. Wyhle*, 5 Bing., 485, *Best., C. J.*: “Guarantees ought to receive a strict construction, and they should be so drawn up as to embrace in terms the dealing intended to be guaranteed.” *Holl v. Hadley*, 5 Bing., 54. Evidence that according to the custom of the trade the plaintiff delivered coal to *Nath. Hadley* daily, and that at the end of every month he gave a bill payable at two months. The defendant’s guarantee was for the payment

of coals to be delivered to *N. H.* at a credit of two months from the delivery. Held not sufficient. "With every anxiety," said *Best*, C. J., "to get rid of the nonsuit in this case, we are of opinion it cannot be set aside."

"The plain and manifest intent," says *Dallas*, J., "is always to be looked to." Now, what was the plain and manifest intent here? The defendants have signed a guarantee without limiting the amount—an imprudence which throws the onus of attacking it on them, and although the jury, induced perhaps by the deposition of *Webb* that *Adams* several times stated his claim in the presence of the other parties, at \$16,000, have found for the plaintiff on the issue of fraud and misrepresentation, still, I must confess, looking to the surrounding circumstances and to the evidence of both the defendants and *Cutter*, that I should have been better satisfied, had a question as to the amount they intended and agreed to guarantee been submitted to the jury in express terms.

We must recollect, too, that an immense power, and that of an unusual kind, was to be entrusted to *Mr. Fessenden*, "in case *Cutter* should neglect and fail to comply with and perform his contract and agreement to adjust and settle the accounts, on or before the 1st day of *May*, 1870." Now, if the plaintiff was in fault between *December*, 1869 and *May*, 1870, in neglecting to render his accounts, and especially, during the two days in *April*, 1870, when *Cutter* and *Culhoun* were in Portland, he cannot avail himself of his own wrong. It is obvious, from the language of the charge, that this was the Judge's opinion, and I cannot but concur with it. There was a condition here to be performed by *Adams* as well as by *Cutter*, and the rule is that if the continued liability of the surety is made dependent upon the observance of certain terms and conditions by the creditors, these terms must be strictly observed, or the surety will be discharged. *Addison on Contracts*, 575.

The case of *Watts v. Shuttleworth*, 5 H. & N., 247, affirmed by the Exchequer Chamber, 3 L. T. R., 58, is very instructive upon this head. *Pollock*, C. B., said; "The rule in Equity seems to be, that if the party guaranteed does any act injurious to the surety or inconsistent with his rights, or if he omits to do anything which his duty enjoins him to do, and the omis-

sion proves injurious to the surety, the latter will be discharged." He then cites *Storey's Equity Jurisprudence*, and the case of *Pearl v. Deacon*, 24 Beavan, 186-191, where the Master of the Rolls, approving of the decision in 14 Ves., 164, says, that the rights of a surety depend rather on principles of equity than upon the actual contract—that the right of the surety depends on the equitable relation of the parties.

Hence, it is laid down in *Owen v. Homan*, 3 McN. & Gordon, 378-396, that the creditor must make a full, fair, and honest communication to the surety, of all circumstances connected with the transaction to which the suretyship is to be applied, which are calculated to influence the discretion of the surety into entering into the required obligation. It is true that this last is an equitable case, and that in *Watts v. Shuttleworth* there was an equitable plea, which there is not here; but, the doctrine in the two courts cannot essentially differ. Putting the amount of the award altogether aside, it is clear that the liability of the sureties, whether for a larger or lesser sum, was to be ascertained by the first day of *May*, 1870, or by the 10th at all events, or as soon thereafter as the adjustment could be completed, and the sum so ascertained was to be paid in equal halves, with interest, as I have said, on the 1st of *August* and *November* thereafter. Was it a reasonable delay, then, which postponed the adjustment, without the consent of the sureties, till *December*, or was it such a delay as sustained their 3rd and 6th pleas, and discharged them of liability? The learned Judge, with some hesitation, treated this as a question for the jury; but I think it a question of construction for the Court, to be determined in the light of all the circumstances in proof.

Turning again to Equity, I refer to the case of *Tucker v. Laing*, 2 Kay & Johnson, 745, where it is said that it is not every alteration of the position of a surety by the act of the creditor, that discharged the surety. To have this effect, the alteration must be such as interferes for a time with his remedies against the principal debtor. Now, the defendant's remedies against *Cutter*, although practically they might have been worth little, were to have accrued on their payment of the first moiety on the 1st of *August*. The delay, therefore, did interfere with their remedies and came within the rule.

There is another view of this case, which, although it was not mooted at the argument, it may be well to notice. In the agreement it is said, "That *Cutter* is indebted to *Adams* in an amount which is as yet unliquidated," and *Cutter*, as we have seen, "contracts that on or before the 1st day of *May*, 1870, he will adjust and settle all the mutual accounts pertaining to the business between him and *Adams*, and will pay to *Adams* the full amount that shall be found due to him upon such adjustment and settlement of accounts." The payment, therefore, was to depend upon the adjustment, and it appears from the evidence that the adjustment was hindered and ultimately defeated as between *Adams* and *Cutter*, by the delays of *Adams* himself. It is for this reason, perhaps, that *Cutter's* failure to adjust and pay the balance before the reference to *Fessenden*, although charged in the declaration as the cause of that reference, is not charged as a ground for the claim of damages, which are put at the full sum awarded by *Fessenden*. If damages would be recovered under the above clauses for the alleged failure of *Cutter* to adjust and settle before the 1st of *May*, they could only be unliquidated damages on a declaration differently framed. It would be impossible, I think, on such a claim, to sustain a verdict for the sum awarded by *Fessenden*, as against the defendants depriving them of the protection the agreement afforded them in point both of adjustment and of time. For these combined reasons—that *Fessenden's* award was not made in time—that the delay has discharged the defendants, as sureties, and that the full amount cannot be recovered from them as unliquidated damages, I think that the verdict in favor of the plaintiff for that amount should be set aside.

Our judgment on the demurrer will depend chiefly, if not altogether, upon technical grounds. The first count sets out the agreement of *December* 15th, 1869, with a material omission, however, as we now learn, affecting the whole contract, but which, of course, we cannot consider in this part of our judgment. The agreement must now be looked to as it is represented, not as it was; but the count sets out the promise by *Cutter* to adjust and pay the amount found to be due to plaintiff on such adjustment in one and six months from said first of *May*, with interest. It then alleges, on *Cutter's* failure

to adjust and settle the accounts, the award by *Fessenden* bearing date the 22nd of *December*, 1870, and the guarantee by defendants, in consideration of the agreement to the plaintiff, for the performance by *Cutter* of his promise, and the defendants liability to pay the plaintiff the sum awarded by *Fessenden*, with interest, from *May* 1st, on the 22nd of *December*. 1870—that is, the sureties are charged as liable to pay, in one sum, on the 22nd of *December*, 1870, without demand or notice, what *Cutter* had bound himself to pay, and the defendants had guaranteed that he would pay in equal moieties, on the first days of *August* and *November*. Here arises, on the face of the account, notwithstanding the omission I have noted, the same incongruity, the same alteration in the position of the principal and sureties that I have already insisted on rendering, as I think, this first count bad in substance.

The second count is an account stated, and the demurrer being to the whole declaration, it cannot, of course, as to that count, be sustained. By the modern rule, the plaintiff, where one or more of the counts demurred to are good, is no longer entitled to a judgment on the whole demurrer as being too large. *Bullen & Leake*, 823; *Briscoe v. Hill*, 10 M. & W., 735.

The question raised on the first count turns upon a very nice point of pleading. If *Cutter's* neglect in the first instance to adjust and settle was, of itself, a ground of action, the defect in that count was the want of a specific breach thereon, and I have not found any case precisely in point. The nearest approach to it is the case of *Marsh v. Bulteel*, 5 B. & Ala., 507. See also *Charnley v. Winstarley*, 5 East., 266, and *Head v. Baldrey*, 6 A. & E., 459; *Stephen on Pleading*, 9th American Edition, 145. According to our practice, I am of opinion that the defendants are entitled to our judgment on the first count, and the plaintiff to our judgment on the second.

IN RE SWORD'S LEASE.

A LEASE of certain coal areas granted to S. was declared forfeited by the Commissioner of Mines, on the ground that the areas had been abandoned, and not effectively and continually worked for the space of one year. S. was absent from the Province at the time the proceedings were taken, and the only notice given him was by means of a paper posted upon a cliff near the sea-shore, the areas being under water. This notice was defective for want of definiteness as to the charges against S., and moreover, there was no evidence given before the Commissioner that the Sheriff who posted the notice had made any enquiry to ascertain whether there was any agent or person employed in connection with the premises upon whom, in the absence of S., the notice could have been served, nor was any evidence given as to the locality of the cliff upon which the paper was posted, or its contiguity to the areas in question.

Held, That the preliminary notice being deficient in so many points, all proceedings founded upon it were void, and therefore the forfeiture must be set aside.

DESBARRES, J.. now, (December 22nd, 1873,) delivered the judgment of the Court:

This case was argued before us at the last term, under a rule *nisi* granted by this Court to set aside and cancel an order or judgment of forfeiture made and given by the *Hon. Robert Robertson*, late Commissioner of Public Works and Mines, of a lease executed on the part of the Crown on the first of *June*, 1867, to *William Sword*, since deceased, of a coal mining area situate on the shore in the County and Island of *Cape Breton*.

The grounds set forth in the rule, upon which it is sought to set aside the order of forfeiture are, first, That the order or judgment and all proceedings on which it is founded, is and are illegal, irregular, and not in conformity with the statutes; and, secondly, Because there was no notice given to the lessee, *William Sword*, as required by law, and that the Commissioner of Mines had no authority to make the order and pronounce the judgment.

It appears from the papers sent up to this Court under the writ of certiorari issued in this case, that the proceedings in it were instituted by the Commissioner of Mines, at the instance of, and on a representation in writing made to him by *John B. Campbell*, dated 15th September, 1869, marked "A," calling the attention of the Commissioner to the fact that *Sword's* lease was forfeitable "under section 109 of the Act consolidating the statutes relating to Mines and Minerals, he having failed to comply with the conditions of his lease."

Acting on that representation, the Commissioner of Mines, on the 5th of *May*, 1870, addressed a notice to *William Sword*, marked "B." to the following effect: "It has been represented to me that you have failed to comply with the provisions of the lease granted to you by Her Majesty the Queen, of a coal area near *Glace Bay*, in the County of *Cape Breton*, dated *June* 1st, 1867, and that you have, for the space of one year, abandoned, and have not effectively and continually worked the said area. I, therefore, as per clause 109 of the Act relating to Mines and Minerals, give notice that on *Wednesday*, the first day of *June*, 1870, at ten o'clock in the forenoon, I will hold a Court in my office, in *Halifax*, to investigate the said representation, and you will govern yourself accordingly." This paper, as appears from an affidavit of *Charles W. Hill*, was on the 12th *May*, 1870, by him placed on the edge of a cliff at the sea shore between *Bridgeport* and *Glace Bay*, in the County of *Cape Breton*, as a notice to *William Sword* of the investigation intended to be made by the Commissioner of Mines for the violation of the provisions of the lease under the section named. The Court, presided over by the Commissioner of Mines, met pursuant to the notice, at the time and place appointed, and on that day the representation contained in the letter of *Mr. Campbell* to the Commissioner of Mines, marked "A," was produced and put in, together with the affidavit of *Mr. Hill* of the service of notice upon *William Sword*, as therein described. The Court met for the third time on the 4th *June*, 1870, and upon that occasion *John Rutherford*, Inspector of Mines, was examined as a witness and testified that he was acquainted with the property, saw it last fall, visited it officially then and observed that the area in question had not any work done on it; that all returns from coal mines, according to the course of business in the office, passed through his hands, and no returns from this area had ever been made to the Commissioner of Mines and Works office, and nothing had been done on this area from the time of the application to the time of the obtaining the lease of the area by *William Sword*.

Upon this evidence alone the Commissioner of Mines, on the first of *July*, 1870, pronounced judgment on the question involved, to the effect that after a full investigation of the

charges made by *John B. Campbell* against *William Sword* for non-fulfilment of the conditions of the lease, he had decided that the charges were fully sustained, and therefore declared the lease forfeited.

On the 4th *August*, 1870, the copy of a notice dated 6th *July* of that year, addressed to *William Sword* and signed by the Commissioner of Mines, announcing his judgment of forfeiture, and declaring it to be under the provisions of chap 1, section 110, of 32 *Vict.* (1869), was, as it appears from the affidavit of *Charles W. Hill*, posted in a conspicuous place at the sea shore between *Bridgeport* and *Glace Bay*, in the County of *Cape Breton*, on the land near the areas leased, the same being covered with water. In this affidavit it was stated by *Mr. Hill* that no person known to him was in possession of the property or interested therein, upon whom service could be made.

These are the facts upon which we are to form our opinions as to the legality or illegality of the proceedings had before the Commissioner of Mines, and on which he pronounced the lease in question to be forfeited to the Crown. That he possessed the power under chapter 1, section 110, of 32 *Vict.*, to inquire into and adjudicate upon the question involved in this case, there can, it appears to me; be no doubt; but the question for our consideration is, whether he exercised the large powers entrusted to him consistently with the requirements of the law, all of which must be strictly observed in a case like this.

The facts testified to by *Rutherford*, who was the only witness called before the Commissioner of Mines, were not controverted by the lessee, no person having appeared before the Commissioner to protect his interest in the lease; but although the evidence of this witness shews the mining area had not been worked upon, it appears from the affidavit of *Mr. Hendry*, the administrator of the estate of the lessee, who is now seeking to cancel the judgment of forfeiture, that so far from having any intention to abandon this property, the lessee, aware that a large expenditure of money would be required to develop it, had, with that view, proceeded to *Great Britain* to solicit the aid of capitalists, and had, as he was informed, entered into arrangements with the proprietor

of certain iron works, for the manufacture of certain expensive machinery to enter upon the work; that while he was so engaged, *Mr. Campbell* caused proceedings to be taken for the forfeiture of the lease, which resulted in a judgment being pronounced against him by the Commissioner of Mines.

The proceedings in this case having, as it appears, been conducted in the absence of the lessee, one of the principal grounds on which the judgment of the Commissioner is complained of is, that no notice of the proceedings was ever personally or constructively served upon him, and no opportunity afforded him of resisting the charges made against him to procure a forfeiture of the lease. This is an important objection, demanding the most careful consideration, and one which, if sustained, must of itself render the judgment void.

In my view, the legality of the proceedings must depend on the character and sufficiency of the preliminary notice required to be served on the lessee, etc. As that is the foundation on which the decree of forfeiture rests, and if that notice is defective either in point of form or service, though the second and last may be good, no subsequent proceedings had under it can affect the rights of the lessee, for no person can or ought to be deprived of his property by the judgment of any Court, without notice of the grounds on which this is sought to be done. By section 110 of chapter 1, 32 *Vict.* (Act of 1869) it is declared that, "where it shall be represented to, or come to the knowledge of the Chief Commissioner of Mines, that any mines or minerals claimed under a lease from the Crown or under a lease granted pursuant to this act, have been abandoned for the space of one year, or have not been effectively and continuously worked, etc., the Chief Commissioner of Mines shall cause a notice to be personally served upon the lessee or his agent, or person principally employed on the premises, or shall cause such notice to be posted up upon the premises leased, where no person can be found to make service thereof, informing him of such charge and appointing a time, to be not less than fourteen days after the service or posting of such notice, and also a place for the investigation thereof." The notice contemplated by this section of the act of 1869 is the first step which the Commissioner of Mines is required to take, and as this notice, as I

read it, was evidently intended to have the effect and supply the place of a writ of summons or process to bring the party complained of before the Commissioner of Mines to answer the charges made against him, it follows as a necessary consequence that the charges so made must be plain and explicit, so as to give to such party all the information necessary to enable him to prepare for and make his defence.

Now the complaint or charge made by *Mr. Campbell* against the lessee is of a very general and indefinite character. It professes to be a charge for violating the provisions of section 109 of an act, the chapter of, or the year, or reign in which it was passed is not given. But the notice of the 5th *May*, addressed by the Commissioner of Mines to the lessee, is not founded on section 109 of the act of 1869, (if that is the section to which *Mr. Campbell's* charge is meant to apply) it is based, though not so expressed, on section 110, chapter 1, of that act, while it professes to be under section 109. The charge made by *Mr. Campbell*, and that contained in the first or preliminary notice addressed by the Commissioner of Mines to the lessee, are inconsistent with each other, and do not give the lessee the information it was intended he should have. Taken together, these charges were calculated to perplex and mislead the lessee, and leave him in doubt as to the true nature of the charge he was called upon to answer. It was therefore an indefinite and insufficient notice on the face of it, and not such as I think the act required. But there is another serious objection to it upon another ground, and that is, that it was not served in conformity with chapter 1, section 3, of 33 *Viet.*, (1870) made in amendment of chapter 1 of the act of 1869, which declares that where notices are to be posted on the premises under the act hereby amended, or of any of the sections thereof, and the areas in respect of which the notices are to be posted shall be covered with water, *the notices may be posted on the land as near as conveniently may be to the areas so covered with water.* *Mr. Hill*, in his affidavit marked "B," states that he posted a copy of the notice on the edge of the cliff, at the sea shore, between *Bridgeport* and *Glace Bay*, in the County of *Cape Breton*, as a notice to the lessee. He does not state the particular locality of the cliff, or that it was contiguous to or near the

area leased, nor does it appear from the report of the Commissioner of Mines, that any evidence whatever was produced before him as to the locality of the cliff in reference to the mining area included in the lease, or that there was any evidence to shew that any inquiry had been made to ascertain whether there was any agent or person employed in connection with the premises upon whom the notice could have been served. It seems to me impossible, therefore, to hold that the posting of the notice on a cliff at the sea shore between *Bridgport* and *Glace Bay*, in the County of *Cape Breton*, the position of which cliff was not proved to be near the mining area in question, was a service in conformity with section 3 of the act of 1870, which I consider it was absolutely essential to prove in order to legalize and give effect to the judgment of forfeiture pronounced in this case by the Commissioner of Mines.

For these reasons, and on consideration of all the circumstances of this case, I am of opinion that the order or judgment of forfeiture cannot be sustained, and that the rule for setting it aside must be made absolute.

WOODWORTH v. CUTTEN.

DEFENDANT, against whom a judgment by default had been regularly entered up, applied within a year to have the judgment set aside, and to be allowed to come in and defend, disclosing a defence on the merits. Plaintiff was allowed to controvert the meritoriousness of this application, but the Judge decided to grant it on terms.

Held, That having so exercised his discretion, Judge's decision would not be interfered with.

Seemle. It is not a matter of right for plaintiff to reply by affidavit to applications of this kind, and where he is permitted to do so, he should confine himself to the establishing of such other facts, exclusive of merits, as might be considered sufficient to defeat the application.

McCULLY, J., now, (December 22nd, 1873,) delivered the judgment of the Court :—

This is an appeal from a Judge's order by plaintiff, who had marked a default regularly for want of appearance and plea. The application to remove this default was made within a year after final judgment, upon affidavits accounting for defendant's non-appearance, and disclosing a defence upon

the merits, with the particular grounds thereof, under section 26 of the Revised Statutes, chapter 134. The plaintiff was allowed to reply and controvert the meritoriousness of defendant's application. This, so far as I am aware, is contrary to the practice heretofore established. It is not a matter of right for the plaintiff to reply by affidavit in this class of cases. And where a Judge or a Court grants leave it has been held that he should confine himself to the establishing of such other facts, exclusive of merits, as might be considered sufficient to defeat the defendant's application. His affidavits have, however, been again read.

After a careful perusal of the affidavits filed and read, whether regarded from one standpoint or the other, that is to say, as showing that defendant was not entitled to the relief sought, in not complying with the requirements of the statute, or on a question of merits, I am unable to arrive at the conclusion that the learned Judge, in making the qualified order for letting defendant in to defend the suit on terms, exercised an unwise or an unsound discretion.

In a case decided so recently as *November 14th, 1873, W. R.*, vol. 22, p. 61, *Martin, B.*, had made an order requiring defendant to attend to answer orally to questions not sufficiently answered by affidavits, &c. *Denman, J.*, there, among other things, remarks: "The Court is always slow to interfere with a Judge's discretion." The statute under which the Judge acted is confessedly one of that class known in the law as remedial, and, therefore, *per Lord Kenyon, Turtle v. Hartwell*, 6 T. R., 429, the Courts will extend the remedy so far as the words will admit. The rule *nisi* must be discharged with costs.

WATSON v. MERCANTILE MARINE INSURANCE CO.

PLAINTIFF shipped a cargo consisting of dry and pickled fish, pork, oats, peas, &c., to Demerara, part of the cargo being on deck, and insured it with defendants. By the policy the latter were not to be liable for partial loss or particular average, unless amounting to five per cent., and as to the oats and dry fish, to be free from average unless general. On the way the vessel encountered very heavy weather, lost all her deck-load, sprung a leak, sustained damage to her rigging, and so was compelled to put in to Barbadoes for repairs, where the cargo was landed, and after survey sold by the master. The cargo was all more or less injured by water, and according to the evidence, the fish, if reshipped, would have been of little value when it reached its destination. The plaintiff knew nothing of what had been done until he received the account sales of the cargo, with the protest and survey, and these he at once sent to the defendants. He claimed for a total loss. Defendants contended that the loss was only partial, and that the cargo ought to have been forwarded. From the evidence it did not clearly appear that the cargo was, upon the whole, so injured as that if forwarded to its destination the expense would have exceeded its value on arrival there. There was no question but that the master acted in good faith, and just as a prudent uninsured owner would have done under the circumstances.

Held, That in the absence of conclusive evidence that the cargo might not have been sent on to its destination at an expense less than its probable value there, the loss must be considered partial, and the defendants liable only for general average thereon, with the exception of the deck-load, which was a total loss.

The proper test in respect to goods which have been sea-damaged and taken to an intermediate port, whether memorandum articles or not, is not whether an uninsured owner would have sold them there, but whether they can be sent on to their destination at a less expense than their value on arrival there, for when the whole or any part of the cargo can be sent on, the master has no authority to sell, nor can the assured recover for a total loss.

RITCHIE, E. J., now, December 22nd, 1873, delivered the judgment of the Court:—

A case having been agreed upon by the parties to this suit, was submitted to the Court for its decision.

The plaintiff shipped in the brigantine *Six Freres*, on a voyage from *Halifax* to *Demerara*, a cargo of merchandize, consisting of dry fish in casks and boxes, invoiced at \$7,301.50; fifty barrels of pork at \$1,075; twenty casks of oats at \$161; one hundred barrels of mackerel at \$800; split peas at \$45.50; hay at \$40.69; lumber at \$15; shingles at \$18.75; and twenty-five barrels of herrings at \$12.50, amounting, with the charges of shipment, &c., to \$11,119, besides a deck load invoiced at \$171.41, on the former of which the defendants insured the sum of \$6,000, and on the latter \$150. By the policy the defendants were not to be liable for partial loss or particular average unless amounting to five per cent., and by the usual memorandum the *oats* and *dry fish* were warranted by the assured free from average unless general.

After leaving *Halifax* the brigantine encountered very heavy weather, she sprung a leak, was thrown on her beam

ends, and part of the deck load was thrown overboard, the remainder having been washed away ; besides serious damage to the rigging and spars of the vessel, her deck was broken open by one of the spars falling on it.

On account of this damage the vessel put into *Barbadoes* for repairs, where the cargo was landed and after survey was sold by the master. It appears from the evidence referred to in the case that the dried fish were found more or less damaged by sea water, as well as the hay and oats ; that some of the fish were in a putrified state, and the pickled fish deteriorating, some of the mackerel having become tainted ; that the lumber, shingles and pork, not being of a perishable nature, might have been re-shipped, and it was possible that some of the pickled fish might have been re-shipped, but the witness would not undertake to say what its state would have been on its arrival ; the witnesses concurred in thinking that as all the fish was deteriorating, it would be worth very little when the vessel was repaired and ready for sea ; that it would have been folly to have sent the rotten fish on another voyage, or to have sent the vessel on with so inconsiderable a portion of the cargo as the lumber and pork ; that a trading schooner could have been found to forward the cargo to its destination, but as the last-mentioned articles were the only portions of the cargo fit, in their opinion, to be re-shipped or kept in store, the sale of the whole was, they considered, most for the interest of all concerned, and a sale took place in accordance with their recommendation. A general average statement was made at *Barbadoes*, which settled the amount to be contributed by the plaintiff or his insurers at \$1,079.54. The plaintiff heard nothing and knew nothing of the damage to the vessel and loss until he received the account of sales of the cargo, with the protest and surveys, which he at once enclosed to the defendant's agent, furnishing him thereby with proof of loss and interest, as required by the policy.

The plaintiff claims for a total loss of the whole cargo, as well that under deck as that above. The defendants contend that the loss was only partial, and that part of the goods were free from partial loss under the memorandum, and that the cargo was in a condition to have been forwarded to its destination, and ought to have been forwarded.

If the Court should decide that plaintiff is entitled to recover for a general average, actual or constructive total loss, and total loss of deckload, judgment to be entered for \$2,986.65, with interest from 31st May, 1871, and costs. If the Court shall be of opinion that the plaintiff is not entitled to recover for a general average, or particular loss, or loss of deckload, then the defendants to have judgment with costs. The policy, the declaration and pleas, the evidence taken under commission, and the invoice of the goods to be considered part of the case.

There are no grounds whatever for contending that the defendants are not liable for a total loss of the deckload, which was insured separately for a specific sum, and was entirely lost by the perils insured against; indeed, the contention on this point was abandoned on the argument. The important questions for our consideration are whether the sale of the cargo at *Barbadoes*, by the master, was justifiable under the circumstances, and if so, whether the plaintiff can recover for a total loss without notice of abandonment.

If we should arrive at the conclusion that the sale of the cargo was justifiable, the plaintiff would not, I think, be precluded from claiming for a total loss from the want of notice of abandonment. An abandonment implies that there is something to abandon, which is to be transferred to the insurer, in which case, if the owner means to claim for a total loss, he must give notice of abandonment in a reasonable time after intelligence of the disaster, but where, before receiving such intelligence, the goods insured have been sold, and he receives at the same time information of the disaster and of the sale, then, if the sale was justifiable, there was nothing to abandon, and an abandonment could be of no avail. In *Farnworth v. Hyde*, 18 C. B. N. S., 835, this point came up, and it was held that notice of abandonment was not necessary when the information of the loss and of the sale of the cargo reached the assured at the same time. The question was very much discussed in *Potter v. Rankin*, first in the Common Pleas, then on appeal in the Exchequer Chamber, and finally in the House of Lords. L. R., 3 C. P., 562; L. R., 4 C. P., 76; L. R., 5 C. P., 518; L. R., 6 E. & L., App. 83. Mr. Justice Brett,

in the last-mentioned report, p. 102, says: "It seems to me to be a proposition without foundation of reason to say that there must be an abandonment when there is nothing to abandon. If the case of *Knight v. Faith*, 15 Q. B., 649, decided the contrary, I, with deference, think it a wrong decision. The view of the Court of Common Pleas, in *Farnworth v. Hyde*, not overruled on this point in the Court of Error, seems to me to be correct. I venture to affirm that it is a correct proposition of insurance law to say that no abandonment is necessary and no notice of abandonment is required where there is nothing to abandon which can pass to or be of value to the underwriters." Mr. Justice *Blackburn*, on page 121, says, "where the assured could not learn that his ship had got into difficulties at a distant place till long after the disaster, and the underwriters could only send out orders which would arrive later still, under such circumstances, a notice of abandonment was often a very idle ceremony, and in my opinion unnecessary if the facts did amount to a total loss, inoperative if they did not; if there was nothing they could do, no notice, I think, is required." This, I apprehend, is the principle of *Cambridge v. Anderton*, 2 B. & C., 691; *Roux v. Salvador*, 3 Bing. N. C., 266, and *Farnsworth v. Hyde*; for as has often been observed, a sale by the master is not one of the underwriters' perils, and is only material as shewing that there is no longer anything which can be done to save the thing sold for whom it may concern. It conclusively determines that neither assurers nor assured can do anything, and consequently that a notice of abandonment would be but an idle form on which nothing could be done, and which therefore is unnecessary. Lord *Chelmsford*, p. 157, referring to *Farnsworth v. Hyde*, said: "This case seems to place the rule as to notice of abandonment on a reasonable foundation; no prejudice can possibly arise to the underwriters from withholding a notice where it is wholly out of their power to take any steps to improve or better their position." Lord *Hatherly* and the other Judges concurred in these views, and they are so applicable to the case before us that we can have no hesitation in coming to the conclusion, in accordance with them, that if otherwise

entitled to recover, the plaintiff is not precluded from doing so from the want of notice of abandonment.

I would not have it to be inferred, however, that if an abandonment had been necessary what was done in this case did not amount to it; a claim for a total loss may not necessarily imply an abandonment, but it may be so made as to convey as plain an implication as if made by express words; a letter to the underwriters containing a statement of the loss, and enclosing an account of sales, and claiming the balance of the amount insured, after giving credit for the salvage, (tantamount to what was done in this case) was held to be a sufficient abandonment. *Patapasco Insurance Co. v. Southgate*, 3 Peters, N., 604; and in *Curry v. Bombay Native Ins. Co.*, L R., 3 P. C., 72, information of the wreck of the vessel and claim on the underwriters for payment of the amount of the policy on the cargo was held to be sufficient notice of the abandonment. In *Phil. Ins.*, p. 1682, the author says: "The rule dispensing with any particular form of abandonment amounts substantially to the rule that it is sufficient for the assured to signify distinctly that he abandons, and he cannot signify this more distinctly than by claiming a total loss. I therefore conclude," he goes on to say, "that the claiming of a total loss is a sufficient expression of an intention to abandon."

But have the goods insured by the defendants sustained such an amount of sea damage as justified the sale of them at *Barbauloss*, and entitle the plaintiff to claim a total loss?

If the rule in relation to an insured cargo were the same as that recognized in the case of a ship, that when damaged and taken to an intermediate port, a sale by the master would be justifiable and bind the insurers when made *bona fide* and under such circumstances as would have induced a prudent uninsured owner to have adopted that course, we might on that test decide this case in favor of the plaintiff, but the proper test in respect to goods which have been sea damaged and taken to an intermediate port, whether memorandum articles or not, is not whether an uninsured owner would have sold them there, but whether they can be taken or sent on to their port of destination at a less expense than their value on their arrival there, for when the whole or any part of the

cargo can be sent on, the master has no authority to sell nor the assured to recover for a total loss. I do not mean to say that where the portion of the cargo saved is so trifling in amount as that it would be manifestly unreasonable to have it sent on or to expect the vessel to resume her voyage to take it, the master may not and ought not to decline further expense in prosecuting an adventure which could be of no practical advantage to the owners, and might be very detrimental to their interest.

In the case before us some of the property insured has been shown to have been in a very damaged state; but a considerable portion of it was but partially injured and capable of being taken on in the vessel or of being re-shipped, and the means of re-shipping were at hand, the lumber and pork were uninjured and capable of being stored at *Barbadoes* or sent on to *Demerara*. There is nothing in the evidence or in the case to lead to the inference that the pickled fish had sustained any very serious damage. We are told that some of them, we are not told what quantity, might have been re-shipped, and as regards that part of the cargo consisting of dried fish which had sustained the most damage the evidence is most unsatisfactory. It is described as all more or less damaged, some of it being in a putrified state and very offensive, and all of the witnesses said it would have been an insane act to have sent that rotten fish for another sea voyage. This is strong language, as shewing the opinion of the witnesses as to the advisability of selling it at *Barbadoes* rather than sending it on to *Demerara*; but though a part of the dried fish unquestionably was very bad, have we evidence that such was the character of the whole lot, and are we to infer this when we find that it brought at *Barbadoes* nearly as much as its invoice price, and are we justified in assuming that even this part of the cargo would have been utterly worthless on its arrival at *Demerara* without the testimony of a single witness that such in his opinion would have been the case?

We have no statement or evidence what would have been the probable value of the cargo on its arrival at *Demerara*, or what would be the expense of trans-shipping and sending it on, and we are left in ignorance as to the extent of repairs

required for the vessel, or the time which would be occupied in fitting her for sea, without this information, which it was for the plaintiff to supply. We are not in a condition to say that he has made a case which entitles him to recover for a total loss.

Roux v. Salvador was much relied on for the plaintiff at the argument, but that case differed materially from this. The Court there had the evidence which we have not. Lord Abinger, C. J., speaking of perishable goods, said: "If goods once damaged by the perils of the sea and necessarily landed before the termination of the voyage are by reason of that damage in such a state, though the species be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel, if it be certain that before the termination of the original voyage the species itself would disappear and the goods assume a new form, losing all their original character, the loss is total; the existence of the goods or a part of them in specie is neither conclusive nor in many cases a material circumstance. The jury have found that the hides were so far damaged that they never could have arrived in the form of hides, fermentation and putrefaction had commenced, and a total destruction of the hides before their arrival became as inevitable as if they had been lost into the sea or had been destroyed by fire."

In *Rosetto v. Gurney*, 11 C. B., 176, it was laid down that where the whole or the part of a cargo is practically capable of being sent on, the master cannot sell. If the ship can be repaired, the master must carry it on; if she cannot be repaired he is empowered to send it on, and he cannot sell so as to affect the underwriters with a total loss if he can send it so that on its arrival it will be worth more than the freight and expenses connected with it.

In previous cases a similar doctrine had been held. In *Reimer v. Ringrose*, 6 Exch., 263, a cargo was insured free from average from *Dantzic* to *Hull*. In the course of the voyage the vessel and cargo sustained damage, and the vessel put into a port in *Norway*. The corn was found to be damaged, and taken out for the purpose of drying it and repairing the vessel. The master, finding the corn had received considerable damage, called in advice and resolved to

sell it, and it was sold partially dried as damaged corn. The Judge left it to the jury to say whether, if the ship had proceeded on her voyage with the corn partially dried, it would have arrived as corn or rubbish, and he told them that the proper question was not whether a prudent uninsured owner would have so acted, that if indeed the corn, when brought home, would not have sold for an amount exceeding the cost of drying and bringing it home, that would have been a total loss. The jury found that the corn would have arrived in *England* as corn. It had been contended on the trial that the loss would be total if the corn on its arrival in *England* was not a merchantable article, and if the sale was *bona fide* and made under such circumstances that a prudent uninsured owner would have so acted. The Court held that in that case such an owner would have sold at the intermediate port, but that was not the question. It would have been a total loss if the corn had been in such a state at the intermediate port, as, when brought to its destination, it could not have been sold for an amount exceeding the expense of drying and bringing home, and if that point had been made out at the trial it ought to have been left to the jury. And in *Navone v. Haddon*, 9 C. B., 43, a verdict was taken for the plaintiff, subject to a case agreed upon. A cargo of 81 bales of silk was insured, warranted free of average. The ship, having sustained damage, put into an intermediate port, when it was found that 44 bales had sustained no damage, and these, with 11 bales slightly damaged, were sent on. The rest were saturated with sea water, greatly heated, partly in a state of putridity, and emitted an intolerable stench, and if re-shipped would have arrived spoiled and perished, and wholly valueless, and would have destroyed other perishable parts of the cargo, that no part could have been properly re-shipped, and that no endeavour to prepare the silk for re-shipment would have been successful, and that a loss had been sustained on what had been purchased and sent to *England*. On the other hand it was in evidence that the silk could have been sent to *England*, and there washed and dealt with as to retain the character of silk. *Marle, J.*, after pointing out the principle on which *Roux v. Salvador* was decided, said the loss there was clearly total. Here the

cargo was much damaged, but not to such an extent as to prevent its being carried as silk to its destination. A partial loss cannot be turned into a total loss, because those who have the control of the goods may act prudently in selling them at an intermediate port rather than incur the expense of cleansing and re-shipping them. It may be a prudent owner would have done so and not have gone further with them, but that does not make the loss total, and *Creswell, J.*: "There are some exceptions to the rule laid down by Lord Mansfield, (*Cooking v. Frese.*) Still if the goods are in such a state that they are capable of being forwarded, however they may be deteriorated, the loss is not total." In the case of *Farrsworth v. Hyde*, L. R., 2 C. P., 204, the doctrine in *Rosetto v. Gurney*, the last in point of time of the cases I have referred to, was distinctly recognized by the whole Court as correct, and it was held that where goods are lying damaged at a port short of their destination, in order to ascertain whether there is constructive total loss, the jury must determine whether it is practically possible to carry them on, that is, whether to do so will cost more than they are worth.

We have every reason to believe that the master, acting on the advice of those whom he consulted, sold the cargo of the *Six Freres* in good faith, in the belief that to do so would most subserve the interest of the owners, yet though that belief may have been and probably was well founded, it does not follow that the underwriters are liable for a total loss, and without evidence to justify us in coming to the conclusion that the cargo or such parts of it as were undamaged or but slightly damaged might not have been sent to its destination at an expense less than its probable value there, we must hold the loss to be but partial, and that the defendants are only liable for a total loss of the deckload and for a general average on the rest of the cargo, while they are entitled to judgment with costs.

SCOTT v. BRUNTON.

PLAINTIFF was sub-contractor to defendant, who was engaged in the erection of a large building. Defendant was under agreement with the owner of the building to have it finished within a certain time or to pay a penalty for each week thereafter, and when contracting with plaintiff it was agreed upon between them that if the penalty should be incurred through the dilatoriness of the plaintiff, the amount of the penalty should be deducted from the sum to be paid by defendant to plaintiff under the sub-contract. The completion of the building was delayed for several weeks, and the defendant, alleging that this was the fault of the plaintiff, withheld the amount of the penalty when settling up with him, and upon being sued therefor pleaded that fact, to which plaintiff replied that the delay was not caused by his dilatoriness, but by defendant requiring him to do extra work, and also by defendant not being ready for him when he began to work. The jury found for the plaintiff on all the issues thus raised.

Held, That the verdict should not be disturbed.

MCDONALD, J., now (December 22nd, 1873,) delivered the judgment of the Court:—

In this cause the plaintiff sued the defendant upon the common counts, among which were a count for work, labour and materials, and one upon an account stated.

The defendant pleaded never indebted, payment and satisfaction, and a special plea setting forth that he the defendant had contracted with *Sarah Howard* and *Henry Howard* to erect a building for them and to finish the same on or before the 15th day of *August*, 1868, and that he further agreed with them that he would forfeit the sum of £10 for every week that the completion of the work would be delayed beyond the time mentioned; which forfeiture should be deducted, as liquidated damages, from the amount to be paid him by the *Howards* for the work. He then alleged in the same plea that the plaintiff agreed with him to do the carpenter work of the same building in the manner and within the time mentioned in the agreement between him and the *Howards*; and that the plaintiff also agreed that if the forfeiture mentioned in the first agreement would be *enforced through the dilatoriness or otherwise* of the plaintiff, the amount of the enforced penalty should be deducted from the sum agreed to be paid by the defendant to the plaintiff upon the sub-contract; and he averred that the completion of the building was, in fact, delayed for upwards of seven weeks owing to the dilatoriness and fault of the plaintiff, and that the *Howards* having exacted from him the amount of the

forfeiture, (\$280,) the plaintiff became liable to him, the defendant, for the same.

Upon these several pleas the plaintiff by his first replication joins issue ; and also pleaded, by way of a special replication, among other things, that the agreement entered into between the plaintiff and defendant had been afterwards abandoned by an' oral agreement and a new bargain made ; that the delay mentioned was occasioned by the plaintiff's having had to perform extra work for the defendant, and that the penalty referred to never attached.

Although there is considerable evidence for the jury under this special replication, I think that the evidence as a whole is not less applicable to the other issues raised by the pleadings. If the defendant's allegation, in his third plea, that the delay was caused by the dilatoriness and fault of the plaintiff, has not been sufficiently proved, then there is no defence to this action, and the plaintiff having, by his first replication, denied that allegation, the *onus* of proving it clearly rests upon the defendant. It is said that such a denial should not have been pleaded with the special replication, but that question is not now for our consideration. It would be as correct to say that the special replication should not have been pleaded with that denial. If it was improperly pleaded, which I do not say it was, the defendant could have got rid of it in the ordinary way. He did not do so, and the question now for our consideration is whether the finding of the jury should be upheld under the evidence and the issues as they appear upon the record. The written agreements and other evidence prove the defendant's third plea beyond a doubt, except the simple question of fact, namely, whether the work was or was not delayed *through the dilatoriness and fault of the plaintiff*. The defendant and *Busch* certainly gave strong evidence on that point for the defence, but the plaintiff, corroborated by *McGregor*, also gave strong evidence to the contrary. He maintains that the delay was occasioned, not by his dilatoriness or fault, but by the fault of the defendant, and says : " I had to wait for plastering and drying. I had to put men on extra work that I required on work not extra. But for extra work required I could have the building finished in time. The second delay was to be referred to the rafters and cornice not

being prepared then. Delay arose from *Busch* and the defendant not having their work ready for me." He says that he refused to undertake the extra work till he was promised an extension of time ; which is not contradicted, and says : " Delay for one hour was not occasioned by my dilatoriness." *McGregor*, after corroborating the plaintiff's evidence generally, says : " But for extras would have been finished by middle of August."

It was said at the argument that no extra work was done involving delay, that the only change made in the first agreement between the plaintiff and defendant was the substitution of furring for lining, and that that change would not involve delay, but the contrary. I do not think that was the case. The plaintiff says that before *Howard* went home he wanted extras done ; that the defendant and *Busch* ordered all extras ; that he got \$200 for extra work and materials from the *Howards*, and that he compromised with them for that sum. *Ebenezer Howard* produced a receipt from the plaintiff and testified that \$60 *additional* were paid him for extras, and the defendant himself says : " No extra work except laying the cellar floor was done by my directions." If it be true that the *Howards*, by their agent or otherwise, got the plaintiff to do extra work which involved delay, and if the defendant knew that fact, as can scarcely be doubted, and if they, without the knowledge or consent of the plaintiff, undertook to settle between themselves an amount which they called a penalty for delay, with a view to saddle the plaintiff with the payment of it, under what they conceived to be a legal liability, they were guilty of very unfair dealing, to say the least of it.

It was also contended at the argument that the plaintiff, by his agreement with the defendant, was bound in law to finish the work, under any circumstances, within the time limited in the first agreement, but, I do not think that is law. Whatever construction may be put upon the agreement between the defendant and the *Howards*, it does not follow that the plaintiff is liable to the extent of *Brunton's* liability. The defendant undertook, without any condition and under all contingencies, to pay the forfeiture if the work were not finished by the time limited. The plaintiff undertook to pay

it only in case the work were delayed beyond that time through his dilatoriness. The defendant undertook to do the whole of the work, and nothing was to be done by the Howards. The plaintiff undertook to do but a part, and that part could only be done after the defendant had done other work. If the rule of law contended for on behalf of the defendant were to be upheld, it would follow that, in case he delayed his own work for any cause, whether it be inability to perform it or design, so that the plaintiff could not perform his sub-contract, he could still indemnify himself against the consequences of his own wrong at the expense of the plaintiff. The case of *Moon v. Whitney Union, (Guardians,)* reported in 3 Bing. N. C., 814, and 5 Scott, 1, and referred to in Fisher's Digest, vol. 5, p. 9118, is very much in point. There "the defendant employed an architect to draw a specification of a building, and he employed the plaintiff to make out the quantities. The plaintiff's work was to be paid for by the successful competitor for the building contract, but a dispute having arisen between the architect and the defendants, they refused to go on with the work; upon which the architect sent in his bill for making out the quantities. The defendants paid the architect's account only. Held that, as the defendants had, by their own act, rendered it impossible that the successful competitor should defray the plaintiff's charges, according to the understanding, they were liable to him for the amount of his charge."

The other issue which remains to be referred to is that taken by the defendant upon the count for an account stated. By the particulars endorsed upon the plaintiff's writ of summons, he claims \$523.05, amount of account stated, and gives credit for \$243 subsequently paid, leaving a balance of \$280.05. The plaintiff produced in evidence an account handed him by the defendant, dated the 22nd day of February, 1869, endorsed 21st February, 1869, and corresponding with his version of the transaction. No mention is made, on the face of that paper, of any charge for a forfeiture, but the forfeiture, if it ever accrued at all, must have accrued a considerable time before that date, as Busch gave a certificate of finish in December, and the Howards were in possession of the building shortly afterwards. The plaintiff was told in the

previous summer that the penalty would be enforced against him, and he replied that if such were attempted he would hold the building. The defendant could not have forgotten it, and if, so late as the 22nd day of *February*, 1869, in view of these facts, still intending to charge the plaintiff with the forfeiture, he handed the latter, as he must have done, the paper referred to, *without any reference upon the face of it to the penalty*, he did a very foolish act, which one can scarcely suppose he would have done. The plaintiff and defendant are at variance as to the conversation which took place at the time of the alleged accounting, and the latter says that at that time he thinks he had not settled with the *Howards*. That statement would have been more weighty if his other statement, to the effect that the account was delivered in *December*, had been borne out by the facts; but it is not so, unless it was delivered long before its date, which is incredible. The plaintiff says that the building was in possession of the *Howards* over a month before the adjustment, and the date of the account, coupled with the other evidence, proves that he even underestimated the time. Some weight has been attached to the statement made by the plaintiff that the defendant never acknowledged a balance of \$280 as due, but he could not have made such acknowledgment, as the balance, if any, admitted as due to the plaintiff was not \$280 but \$523.05, reduced by subsequent payments to \$280. I think that there was evidence enough to justify the jury in finding for the plaintiff under the issues raised by the pleadings, and that it is not for the defendant to ask that the verdict should be set aside on the ground that the plaintiff only got half the amount of his claim.

McKINNON AND WIFE v. BRODIE.

R. M., in 1835, conveyed a portion of his land to his sons W. & K., and about the same time allowed them to enter into possession as tenants at will of the balance of his property including the house in which he had resided. R. M. died in 1844, leaving several children, of whom the plaintiff was the youngest. In 1847, the rest of the heirs, including plaintiff, who was then under age, conveyed to W. and K. all their interest in the property. In 1870 the plaintiff brought suit for a portion of the lands in question, alleging that the deed being executed during her minority, was absolutely void and of no effect.

Held, that although the possession of W. and K. must be deemed to be adverse from the year 1847, when the heirs united in giving them a deed, and that therefore plaintiff's right was barred on that ground, yet that under Section 9 of 29 Vict., Chap. 12, having brought her action in 1870, and therefore within five years from 1866, she was entitled to recover.

DESBARRES, J., now, January 12th, 1874, delivered the judgment of the Court:

This was an action of ejectment to recover the undivided share and interest of plaintiff's wife in the land described in the writ. The cause came on to be tried before *Mr. Justice Ritchie*, in *June* term last, at *Radleck*, when the jury found a verdict for one-eleventh part of fifty acres, and a rule having been granted to set it aside as being contrary to law and evidence and the charge of the learned Judge, it was argued before us during the present term, and now remains for the judgment of this Court.

It appears from the evidence that lots Nos. 10 and 11, adjoining each other, and comprehending from three hundred and sixty to four hundred acres in the whole, were, on the 5th *May*, 1820, granted to *Roderick McKenzie*, who, on the 5th *May*, 1835, conveyed to his sons *William* and *Kenneth* the lower or southern one hundred acres of lot No. 10. Up to that time he had resided on the upper or northern part of lot No. 11, and occupied both lots. He then removed from this block of land to land about a mile away from it, leaving his sons *William* and *Kenneth* in possession, who both resided in the house their father had left, and occupied both the house and land in common. The old man *Roderick* died in 1844, leaving eleven children him surviving, of whom *Hannah*, the plaintiff's wife, was the youngest, being then fourteen years of age. *Kenneth* and *William*, after their father's death, separated from each other, and occupied three hundred acres of the block of land, being the whole of lot No. 10 and part

of lot No. 11, *William* taking one hundred and fifty acres on the south part of the lot and *Kenneth* one hundred and fifty acres to the north of it. In 1847, the rest of the heirs, including *Hannah* who was then seventeen years of age, agreed to convey, and did by deed dated 31st May of that year, convey for £100 to *Kenneth* and *William McKenzie*, their respective shares and interests in and to one hundred acres of lot No. 10 and the southern or upper one hundred acres of lot No. 11, of which their father died seized. In 1858, *Hannah*, being then twenty-eight years of age, married *Allan McKinnon*, the plaintiff, and the present action was brought in October, 1870, to recover the land now in possession of defendant, that was conveyed by herself and the other heirs of *Roderick McKenzie* to her brothers *Kenneth* and *William*, by deed of 1847, being part of lot No. 40, alleging that this deed, having been executed during her minority, passed no title, and was, as respects herself, absolutely void and of no effect.

The learned Judge before whom the cause was tried, instructed the jury that though the deed executed by *Hannah* to her brothers could not convey the estate or interest she had in the land to them, yet he thought that from the time of the giving of that deed in 1847, the possession of *William McKenzie* was to be deemed adverse, whatever might have been the character of his possession of the one hundred and fifty acres anterior and subsequent to his father's death, and his possession having been adverse at the time of the passing of the act of 29 Vict., chapter 12, (Acts of 1866), that act applied, notwithstanding five years had not expired from its passage before the action was brought, and as *William* had been in possession upwards of twenty years before it was commenced and his title was conveyed to defendant, he thought the plaintiff could not recover, notwithstanding the verbal recognition of the rights of *Hannah* to a portion of the land was attempted to be established by the evidence.

Upon these instructions of the learned Judge, and in view of the evidence as to defendant's possession, we are now called upon to give judgment, and decide whether the verdict found in this case can be sustained. The first section of the act of 29 Vict., chapter 12, enacts, "that from and after the

31st day of *December*, 1866, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." Considering the deed of 1847 as a deed of no validity so far as *Hannah* was concerned, and as passing no title from her in the land thereby conveyed, it having been executed during her minority, the question is, whether retaining her title, her right of entry is barred by the act of 1866. The acknowledgment made to her by her brother *William*, to the effect that she had a right to a portion of the land claimed, not being in writing, as required by section 8 of that act, did not in any way change the nature and character of his possession or strengthen her title to the land.

It appears from the evidence that *Kenneth* and *William*, the brothers of *Hannah*, entered into possession of lots Nos. 10 and 11 by the permission of their father, as tenants at will, and held and occupied the property together as such tenants up to the time of his death, and they and those claiming under them have ever since, up to the time of the bringing of the present action, held and occupied the land without payment of rent.

The case of *Doe d. Dayman v. Moore*, 9 Adol. & E. (Q. B.) (N. S.) 555, decided in 1846, is very similar to, and must, I think, govern the present. It appeared in that case that one *Peter Dayman*, in 1800, was seized in fee of the property in question. In that year his daughter *Jane* married the defendant. In 1801 *Peter Dayman* put his daughter and defendant in the possession of the property, and the two continued to occupy it uninterruptedly, without paying any rent, up to the death of *Peter Dayman*, which took place in *February*, 1837. Defendant continued to occupy the property from the death of *Peter Dayman* to the death of *Jane Moore*, which took place in *March*, 1843, and thenceforward to the bringing of the action defendant continued in possession. No

rent had been paid since the death of *Peter Dayman*. It was contended on behalf of defendant that the action was barred by the statute of 3 and 4 *Wm. IV.*, chap. 27, and it having been left to the jury to say whether defendant had occupied adversely to *Peter Dayman*, or as tenant at will, they found that he had occupied as tenant at will. There was a verdict for plaintiff, and leave was given to enter a nonsuit. Lord *Denman*, in delivering the judgment of the Court, said: "Let it be assumed that by this state of things the defendant was tenant at will to *Peter Dayman*, then the seventh section of the statute (the same as the third section of the act of 1866) applies; for although in *Doe d. Evans v. Page*, 5 Q. B., 767, that section was held not to be retrospective, yet it certainly applies where there has been no express act done to determine the tenancy at will up to the time of the passing of the statute. By the seventh section, therefore, coupled with the second (the same as the first section of the act of 1866), more than twenty years had elapsed since the expiration of the year from the commencement of the tenancy, and *Peter Dayman's* right of tenancy was gone, except so far as it was saved by the fifteenth section (the same as section 9 of the act of 1866). *Peter Dayman* did not avail himself of that clause. He suffered things to continue as they were till his death, in 1837. His heir, he says, might have entered within the five years, but he did not, and all benefit of the fifteenth section to any one was at an end."

In this case, as in that, there was no express act to determine the tenancy, and by the third section of our act of 1866, coupled with the first, more than twenty years had elapsed since the expiration of a year from the commencement of the tenancy, and *Hannah's* right of entry as heir was gone, except so far as saved by the ninth section of the act of 29 *Vict.*, chap. 12, or for five years after the 31st *December*, 1866. Having, however, brought her action within five years after the passing of this act, I think she was entitled to recover in this suit, and that the verdict found in her favor cannot be disturbed.

STEWART v. WHEELER ET AL.

WHEREAS plaintiff replevied certain logs from defendants under a bill of sale, and among those rightfully belonging to him were a number belonging to defendants, which the latter had mixed up with them under the belief that they were all their own.

Held, that there should be a new trial, in order that defendants might have an opportunity of proving what part belonged to them, and what to the plaintiff.

SIR WILLIAM YOUNG, C. J., now, January 12th, 1874, delivered the judgment of the Court:

The logs replevied in this case were cut by the defendants over the lands in the *Smith* and *Essex* grants, dated 2nd August, 1871, which comprehended the land in the *Nain* grant, dated 15th August, 1801. This was known as the *Cockle's* land, having been conveyed to *Win. Cockle* in 1802, and passed by a succession of deeds, on the 17th December, 1871, to *Chas. W. Cockle*, who conveyed it to the plaintiff by deed dated 20th March, 1872. The defendants' cutting commenced 18th July, 1871, and ceased about the 25th February, 1872. The extent of the cutting on the *Cockle's* lot did not appear. About two-thirds of the lot were culled over. Upwards of 2000 spruce stumps were counted, all cut within a year, six and a half of which would make a thousand feet of lumber. All the logs were on the lot in April—none of them appear to have been moved till May. They were hauled on to the ice on *Cockle's* Lake, which is within *Cockle's* grant. Defendants' men cut on other land all round. Some were landed with those cut from *Cockle's* lot—about 2000 were so landed. These were mixed together in the river. It was impossible to tell the logs when in the water, which were cut on the *Cockles* lot, and which elsewhere. The logs, when replevied, were nearly all, if not altogether within the limits of *Cockle's* grant. The Sheriff returned on the writ that he had replevied to the plaintiff 600,000 feet of lumber in logs, 800,000 feet of lumber in logs being claimed in the writ.

On the 20th April, 1872, *Charles W. Cockle* executed a bill of sale to the plaintiff of all the logs which had been cut upon the land and were upon such land at the time of said conveyance. Under these circumstances, what were the rights of the plaintiff when he took out the writ of replevin, on the

25th April, 1872? The cutting on the lot had ceased before his title accrued, and the trees cut became by the severance, in whole or in part, the property of *Chas. W. Cockle*, holding under the older grant. He alone could have maintained an action of trespass against the defendants, but it was contended at the argument that the property in the trees lying on the ground and within the lot passed to the plaintiff by the deed of 20th March, 1872. This contention it would have been difficult to support by authority, nor is it necessary for the plaintiff to rely on it, his title to the trees being strengthened by, if not originating in, his bill of sale of 18th April before action brought. This bill of sale singly, or at least in combination with his deed, gave him, in my opinion, a right to the logs and enabled him to maintain replevin under our statute.

But the evidence clearly shews that along with the logs cut from his own land, he has replevied logs cut by the defendants from other lands and mixed with his. The law on this subject is to be found in 2 *Blackstone's Com.*, by *Stephen*, 85, under the head of confusion of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, and here the English law partly agrees with and partly differs from the civil. If the intermixing be by consent, it seems that by both laws the proprietors have an interest in common in proportion to their respective shares. But if one wilfully intermixes his money, coin, &c., with that of another man, as in this case, the English law, contrary to the civil, gives the entire property to him whose original right has been invaded. Where, however, the quality of the articles is uniform and the original quantities are known or are capable of proof, the party by whose act the confusion took place, would still be entitled, as it seems, to claim his proper quantity. This is Lord *Eldon's* construction of the old law, *Lupton v. White*, 15 Ves., 442. If the articles were of different value or quality, and the original value not to be distinguished, the party injured takes the whole. It is for the party guilty of the imprudence or the fraud to distinguish his own property satisfactorily or to lose it. No court of justice is bound to make discrimination for him. 2 *Kent's Com.*, 9th Edition, 365, and cases there cited. "If a man," said Lord *Ellen-*

borough, "puts coin into my bag, in which there is before some coin, the whole is mine; because it is impossible to distinguish what was mine from what was his." *Colwill v. Reeves*, 2 Camp., 576. On these authorities I am of opinion that the nonsuit should be set aside and a new trial granted, that the defendants may have an opportunity of proving, if they can, what part of the lumber replevied belongs to them, and what to the plaintiff.

BANK BRITISH NORTH AMERICA v. HARVEY.

PLAINTIFFS were holders of a note made by R. C. & Co., and endorsed by M. R. & Co. M. R. & Co. became insolvent, and effected a composition at fifty cents on the dollar, including their endorsement for R. C. & Co. R. C. & Co. also becoming insolvent, the plaintiffs sought to prove against their estate for the full amount of the note.

Held, that they could only prove for the balance after deducting the composition received from M. R. & Co.

MCCULLY, J., now, (January 12th, 1874,) delivered the judgment of the Court:—

The question to be disposed of in this case arises as follows:—Messrs. *Russell, Cochran & Co.* made an assignment under the Insolvent Act, 1864, on 24th *September*, 1872, to defendant. Plaintiffs proved their claim against *Russell & Co's* estate 11th *December*, 1872, on a promissory note made by *Russell & Co.*, and endorsed by *Mowbray, Reeves & Co.* They (*M, R. & Co.*,) stopped payment in *September*, 1872, and by deed of composition dated 27th *September*, 1872, were released by the creditors, the plaintiffs and others, on the payment of 50 cents on the dollar. This composition included their endorsement for *Russell, Cochran & Co.* Plaintiffs, as holders, now claim to rank on the estate of *Russell, Cochran & Co.* for the full amount of the note, without deducting the composition paid by *Mowbray & Co.* Defendant claims that plaintiffs, having been paid one half the amount of their debt by the endorsers before proof of debt made against *Russell, Cochran & Co.*, can only rank on the estate of the latter for the balance.

The question, I apprehend, is not whether the payment by an endorser to a holder releases the endorser of a note.

Assuming that the Insolvent Act of 1869 had never passed, or that it has no bearing on the case, I am not to be understood as saying that the holder may not resort to the maker in a case like the present. But the Insolvent Act introduces a new and important principle, I apprehend, which otherwise might not apply. The case of *Jones v. Broadhurst*, 9 M. G. & S., 173, was cited by plaintiffs, but although the doctrine there enunciated was upheld for a time, it is now questioned, if not overruled, as may be seen by reference to *Byles on Bills*, 5 Am., from 9 London Ed., p. 354, (o. p. 216,) and the numerous cases cited.

The deed of composition of *Mowbray, Reeves & Co.*, to which plaintiffs became parties, bears date 27th September, and at that date for the present purpose they receive 50 cents in the dollar. On the 11th December, 1872, 45 days after, plaintiffs prove against *Russell, Cochran & Co.*, and claim to rank then for their *whole debt*, and not for the balance, that is, the remaining 50 cents on the dollar. This, I take it, they cannot do, and the case of *Ex parte Delastet* cited does not warrant the position.

At page 632 *Byles*, quoting Lord *Hardwicke*, and citing this case, 1 *Rose*, 16, says: "But if, before the bankruptcy of one, or before the proof is tendered, he had received payment of part from the other, he could only have proved the residue under the latter bankruptcy, as the form of proving his debt shows, because *no more* would remain due to him."

In *Ex parte McRedic Re Charles*, 8 L. R., Ch. App., 535, *C. & Co.*, having had large dealings with *P.*, became bankrupt. The account between them shows a cash balance to *P.* Bills had been given to *P.* by *C. & Co.*, in part payment which had been negotiated by *P.*, and had been proved against the estate of *C. & Co.* *P.*'s assignee claimed to be entitled to prove against the estate of *C. & Co.* for the whole amount of the cash balance. Held, overruling the decision of the Court below, that the claim of the assignee was a clear attempt at double proof, and that he could only prove for the difference of the cash balance and the amount of the bill given in part payment thereof.

Had *Mowbray, Reeves & Co.* not gone into insolvency, but being called upon had paid as endorser, to plaintiff as endorsee,

the note in question, no doubt they might have ranked upon the estate of *Cochran & Co.* for the amount paid. But that estate was payee of the note, while they (or their assignee) may, for aught I can see, rank upon *Russell, Cochran & Co.* for *fifty cents* on the dollar, the amount paid for them, yet neither they nor the Bank can or ought to rank for any higher amount. Section 63 of the Insolvent Act of 1869 points to this conclusion, as I take it, and to no other. It reads thus: "No claim nor part of a claim shall be permitted to be ranked upon more than once, whether the claim so to rank be made by the same or by different persons." When the Bank proved against the estate of *Mowbray, Reeves & Co.*, and obtained on a composition 50 cents on the dollar, to that extent their claim as holders of this note was liquidated and extinguished, and the estate of *Mowbray, Reeves & Co.* discharged. In the language of Lord *Hardwicke*, "how, under such circumstances, could plaintiffs or their agent under the form prescribed by section 122, letter Q., prove for any larger amount than 50 cents on the dollar?" His Lordship then said: "He could only prove for the balance, as the form of proving his debt shows, because no more would remain due to him." The oath is: "The insolvent is indebted to me (or to the claimant) in the sum of — dollars for (here state the nature and particulars of the claim, &c., &c.) I (or the claimant) hold the following and no other security for the claim, namely, (state the particulars of the security)." That in this case would be a promissory note made by *Russell, Cochran & Co.* to *Mowbray, Reeves & Co.*, endorsed, and upon which plaintiffs had received 50 cents on the dollar. How, I repeat, could plaintiffs now swear that (*Russell, Cochran & Co.*'s estate) the insolvents were indebted to them for any sum beyond 50 cents on the dollar, having already received 50 cents? The form of oath is conclusive. Judgment must be for defendant with costs.

DOGGETT v. TREMAIN ET AL.

Procedures having been taken to lay out certain roads under Chap. 60, *Revised Statutes*, (3rd Series), all the requisites were complied with and the report duly confirmed by the Sessions. Eighteen months subsequently plaintiff, through whose property the road passed, applied by writ of *certiorari* to have the proceedings reviewed and set aside by the Supreme Court. He had not appeared before the Sessions nor made there any objection to the confirmation of the report.

Held, That having omitted to do so, and the proceedings having been confirmed by a court of competent authority having jurisdiction in the matter, his application should be refused.

MCCULLY, J., now, (January 12th, 1874,) delivered the judgment of the Court, as follows:—

First. A judgment of a Court of concurrent jurisdiction upon the point is as a plea in bar, or as evidence, conclusive between the same parties upon the same matter, directly in question in another Court.

Secondly. The judgment of a Court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another Court for a different purpose.

The proceedings in this case were commenced under chapter 60 of the *Revised Statutes*, (3rd Series,) to lay out roads other than great roads, &c., by a petition of 20 or more freeholders. The requisites of the statutes, so far, were complied with, as per the certificate of W. F., a Justice of the Peace. A precept issued, and a report followed, which the Sessions of *Colchester* confirmed in due course of law. The case now comes before this Court on the proceedings brought up by a writ of *certiorari* and a motion to quash the order of confirmation; the complainant, *Doggett*, excusing or defending his non-appearance before the Sessions, as required by the statute, on the grounds that he was sick at the time. He seeks among other things (and this is his main objection) to attack the petition as not sufficiently precise as to the locality and termini of the roads sought to be opened, of which it appears there were several laid out by the Commissioners through complainant's land, for two of which he accepted the amount of damages appraised, and as regards the whole three signed a paper referring the question of damages to a party by the name of *Cyrus Eaton*. The order of Sessions confirming the

report of the Commissioners passed in *January*, 1872. The application for a writ of *certiorari* was not made till *June*, 1873, or about 18 months after.

The complainant's counsel contends that the terms of the statute were not complied with, inasmuch as the petition was too general and not sufficiently definite. And the proceedings were therefore absolutely void and not voidable merely. The decision in the case of the *Banwen Iron Co. v. Barnet*, 8 C. B., 406, 433, in one of its features is not unlike the present and approaches it very nearly. There a certificate of complete organization had been granted by the Registrar of Joint Stock Companies, pursuant to 7th and 8th Vic., chapter 110, section 7, although the deed of settlement omitted some of the provisions required by statute to be inserted therein. And it was held that a shareholder could not, in answer to an action brought against him for calls, object that the certificate had been granted upon the production of an insufficient deed.

How can *Doggett* object that the precept issued on an insufficient petition? The first clause of section 2 had clearly been complied with, so far as twenty freeholders, &c., had petitioned the Sessions for streets or roads, with cross streets north and south of the railway, &c., &c. This gave them jurisdiction to entertain the subject, and either to reject or grant their request so far as the law authorized them to do so, and the clause 2 says if they (the Sessions) are satisfied of the propriety thereof (of the petition) they may order a precept to issue, &c. If the petition was too general it may have been voidable with the proceedings that followed. But was it absolutely void? Concede that after presentation under the chapter that the Sessions ought to have dismissed the petition for its generality, or that in any subsequent stage of the proceedings up to the filing of the report and before confirmation there was error, how was it to be rectified? How was advantage to be taken of it? By sections 7 and 8 the statute has provided the remedy. Section 7 provides for public notice of a general or special Session to be held, and section 8 declares that the proceedings shall there be considered, and objections, if any, be heard thereto. And the Sessions shall then *confirm* or disallow the proceedings, and

if confirmed they shall be recorded. Has this Court the power to dispense with the requisitions of a statute like the present, and what would be the consequences if they did? The 13th section provides compensation for fencing, and section 14 states that where roads have been or shall hereafter be altered without any demand for compensation, &c., for one year from the opening such acquiescence, it shall be held a voluntary surrender to *Her Majesty forever* for a public highway of all the land through which the new road passes to the width to which the said road was originally laid out. Thus the title to altered roads where no compensation is sought vests, as I assume, the title to all roads laid out strictly under this statute to Her Majesty. And now we are required to divest the Crown of this statutable title.

Had the complainant appeared as the statute provides, and objected before the Sessions, they possibly might have staid their hands, and had the error, if any, corrected by receiving a new petition or otherwise. But the complainant, who does not allege that the requisitions of sections 7 and 8 or either of them had not been complied with on the part of the public, or that he was not aware if the proceedings for confirmation were in progress, lies by and allows them to be confirmed and recorded, and under the excuse that he was sick, when *his personal* attendance was by no means necessary, and without notifying the Sessions even of his sickness, or necessary absence, allows them to proceed,—and then removes their proceedings by *certiorari* here—and attacks the origin of the proceedings as being not voidable but absolutely void.

Archbold, Chitty's 12th Ed., p. 1471, remarks thus: "It is difficult to define the distinction between an irregularity and a nullity. Where the proceeding adopted is that presented by the practice of the Court, and the error is merely in the manner of taking it, such an error is merely an irregularity and may be waived by the laches or subsequent acts of the opposite party. But where the proceeding itself is altogether unwarranted, and different from that which, if any, ought to have been taken, then the proceeding in general is a nullity, and cannot be waived by any act of the party against whom taken."

Applying this principle as a test, can it be said that the proceeding is altogether unwarranted? Had the petition been addressed to another tribunal other than that prescribed and provided by the statute, the Supreme Court, for instance, and the precept had been ordered there, the proceedings would have been a nullity. But here twenty or more freeholders petition the tribunal appointed by law to hear it and like applications, and they, "being satisfied with the propriety thereof," that is, of the character of petitioners and the necessity of new roads and cross roads in the locality designated, order a precept as directed by the statute. The Court was there. The suitors were there. The process was there. The charge is that the allegations it contained were not too limited, but too large and too indefinite. The proceedings were entertained by a competent Court. It, a local tribunal, was not dissatisfied with the manner the petitioners presented their requests. They did not consider the description faulty. The statute made them the judges; and yet it is contended that the petition itself and all that followed is a nullity and absolutely void. The legislature contemplated that some irregularity might occur, and so provided a means for correcting it. But complainant, declining to obey the statute, asks us to dispense with one clause, and yet bases his complaint on alleged non-compliance with its letter. To say the Sessions had no jurisdiction is equivalent to saying that, on reading the petition, had they been dissatisfied with its contents, they had no power legally to reject or dismiss it, for it was void according to complainant's contention.

A suitor in this Court in a matter over which it had jurisdiction by statute—much less 20 of them—would scarcely be told, had he asked more than the statute authorized, that therefore the Court had no jurisdiction, and the process, because too uncertain in its statements or requirements, was absolutely null and void. If not here, why there?

This motion, if it succeeded, would destroy the entire proceedings and leave the county divested of all the monies paid, and with no remedy that I know of for recovering the same back. Hence the usefulness of clause 8 and its provisions before Confederation.

Now I am by no means prepared to say that there is any irregularity, much less that the proceedings had are a nullity. The statute has not prescribed to the Sessions any limitations in reference to locality and termini, and if the singular stands for plural, and *vice versa*, in the construction of statutes, chapter 1, *Revised Statutes*, p. 3, then the Sessions having the jurisdiction exercised their discretion, being satisfied with the description and directed their precept to issue, still retaining the power to confirm or disallow the proceedings at a future stage, of which, if the motion prevailed, they would be deprived.

But the course adopted by the complainant has effectually defeated the operation of section 8 if it were to prevail. That this Court possesses power to review the proceedings of inferior tribunals and correct them where erroneous may not be doubted. But those who complain and desire to enforce strict and technical objections as the grounds of interference with these proceedings, should satisfy this tribunal, that they themselves are not in fault, that they have done all the law required them to do, and yet that there had been a failure of justice. The non-compliance of complainant with the terms of the section, and his not appearing by himself, his attorney, or agent, before the Sessions to object, if he had any objections, is fatal to this application. His affidavit that he was sick is no sufficient excuse to stay the operation of a statute which makes it imperative that objections, if any there be, shall be heard and considered at the time appointed and advertized under the statute, otherwise and in the absence of such, or if made and considered and not decided to be sufficient, they (the Sessions) were authorized to confirm the proceedings. Here no objections were made, although there were many parties interested, and an order of confirmation passed. The effect of which was, I take it, to transfer or confirm the title to Her Majesty as in section 14 provided. Objection was taken to the presentment of one of defendant's affidavits, but the facts were sufficiently verified in the unobjectionable, only there were other minor objections, which have all been duly considered.

I have not touched upon the evidence of waiver and its effects. Although clearly of opinion that unless the proceed-

ings are a nullity throughout, the waiver on the part of claimant is complete and conclusive. He received the compensation allowed him in part for lands taken. He agreed to refer the amount to be appraised for damages to his domain, the whole being but one block or lot intersected by the streets and cross streets prayed for in the petition, and yet after neglecting or omitting to forward any objection to the Sessions, as required by section 8, he now levels an objection at the very foundation of the proceedings. If not an estoppel *in pais*, which I think it is, he by his course of proceedings has effectually deprived himself, for reasons already given, of any remedy under this writ of *certiorari* and the motion for quashing the proceedings of the Court of Sessions.

In reply to a question from the Court, his counsel contended that this remedy is not only open to him, but would remain so for 20 years next after the date of the order of confirmation. This was a startling proposition in view of what would probably transpire in the locality within that period, and yet his premises, if sound, evidently pointed to such a result. In conclusion, if the Sessions had jurisdiction, and I have no doubt whatever that they had, the title passed out of these lands by what, in the *United States*, is known as the doctrine of eminent domain. See *Bouv. L. Dic.*, p. 507, which, among other things, laid down this, and if so a serious question which, in the view entertained, needs no solution how such a title short of an Act of Parliament could be revested. But as remarked this point is not before us. The complainant's rule must be discharged with costs.

ROBERTSON v. LOVETT ET AL.

PLAINTIFF insured his vessel with certain underwriters, of whom defendant was one, and among the conditions of the policy were that the vessel should not proceed to South Greenland, and that any action upon the policy must be brought within twelve months after the claim for loss had been presented. The vessel was lost on a voyage to South Greenland, and the action was not brought until nearly six years after receipt of proof of loss. Plaintiffs contended that independently of the policy they could maintain an action on the "slip," and also tried to explain away the prohibition as to South Greenland, and to prove a waiver of the condition limiting the time for bringing the action.

Held, That no action could be maintained upon the "slip" after a policy had been executed in pursuance of its requirements, and accepted and acted by the plaintiffs, and the plaintiffs having failed to remove the objections founded upon non-fulfilment of the conditions above stated, that the verdict for defendants should be sustained.

MCDONALD, J., now, (January 12th, 1874,) delivered the judgment of the Court as follows:—

By consent of both parties, this cause was tried without a jury, and judgment was given for the defendant. It was an action brought to recover the amount of the defendant's alleged liability for insurance of the barque *Rising Dawn*, under a policy applied for on the 27th day of *October*, 1865, dated the 25th day of the same month, and by the terms of which the adventure began on the day of its date, to continue for twelve months. The total amount insured was \$2,000.00, and the insurers were the members of the "Commercial Insurance Company of *Yarmouth*." By the terms of the policy, there is no joint liability of the members of the company, as each of the insurers, "for his own part," became liable only "for the amount set opposite his name." In that way the defendant, *J. W. Lovett*, became an insurer to the extent of \$66.65, being part of the \$2,000.00, and the vessel, having been lost within the twelve months, on a voyage to *South Greenland*, this action was brought to recover the amount of the defendant's alleged liability. On the margin of the policy is written the words, "not allowed under this policy to proceed to any port in *South Greenland*, nor to enter *Cow Bay, C. B.*, between the first day of *September* and the first day of *May*;" and in the body of it is a printed memorandum providing that no suit to recover any claim under it should be sustainable, unless commenced within the term of twelve months next, after claim for loss should be deposited at the office of the broker; and that if any such suit should be commenced after that time, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim. The vessel was lost about the 12th day of *August*, 1866; the proof of loss was received on the 19th day of *September* of same year, and the writ of summons in this cause was issued on the 16th day of *September*, 1872. The plaintiffs contend that, independently of the policy, they can maintain an action for the amount insured, upon what is called the "slip," which is a memorandum made at the time of their application for insurance,—and their declaration contains a count for that purpose. They also urge that the prohibition from proceeding to *South Greenland* was not a condition, either expressed or

implied, at the time of the undertaking to effect the insurance, but that it was subsequently written on the policy without their knowledge or consent, and that therefore it cannot effect their rights. In anticipation of the objection that they did not bring their action within the twelve months, they alleged in their declaration that that condition was waived before action; and in support of that allegation they produce copies, from the company's book, of two resolutions, one passed on the 30th day of *March*, 1867, the other on the 29th day of *March*, 1868, recognizing the justice of the plaintiff's claim, and referring it to the directors for adjustment.

The slip consists of a number of questions and answers, touching the age and classification of the vessel, her voyage at the time, insurance elsewhere, what was then desired to be insured, for what time, rate of premium and customary deduction; the amount to be insured on the vessel being put down at \$2,000.00. At the foot is written the words, "effect the above on account of *William Robertson & Son*."—Signed by *William Robertson*.

The plaintiff, *William Robertson*, testified that "each shareholder underwrote individually;" and, although it is true that the defendant, together with five others, initialled the "slip"—he did so as director of the company; and, independently of the policy, there is nothing in the whole of the evidence to show who the shareholders were or what was to have been the extent of the liability of either of them. The "slip," as it is called, does not, by any means, support the count in the plaintiff's declaration framed upon it; and, even if it was more formal than it is, I do not see that, after the policy had been executed, in pursuance of its requirements, and accepted and acted upon by the plaintiffs, an action at law could be maintained upon it—certainly not in the present form.

The plaintiffs must therefore, I think, depend upon the policy, but there again they meet with difficulties. The first is the condition not to "proceed to *South Greenland*, nor to *Cow Bay, C. B.*, between the first day of *September* and the first day of *May*." It does not appear that the vessel did proceed to *South Greenland* between the days mentioned, but the construction which the defendant, by one of his pleas, put upon that writing was that, in fixing the time mentioned,

reference was had to the vessel entering *Cow Bay*, not to her proceeding to *South Greenland*, whither, according to his plea, she was not permitted to go at any time during the twelve months. And it was not contended at the argument that the condition was open to any other construction.

What purported to be a copy of a paper dated the thirty-first day *October*, 1865, was produced at the argument, thus worded, "Not allowed under this policy to proceed to any port in *South Greenland*," which paper if, as alleged, it had fairly represented the date at which the company first decided to introduce into their policies the condition not to proceed to *South Greenland*, would have produced some difficulty, as it would then have shown that the underwriters would have attached to the policy now under consideration, a condition which was not in contemplation of the parties at the time of the application and undertaking to effect the insurance, and I must confess that, at first, that was the impression made upon my own mind. But, after carefully reading the evidence, I cannot adhere to that view of the case, because not only was that paper not proved nor put in evidence, but the defendant testified that *Patch* the broker was ordered by the Board, before the plaintiffs applied for their insurance, not to sign any policy without the memorandum being inserted in it. Just then the witness referred to the director's book, and read the entry not to allow any vessel to enter a port in *Greenland*. If the paper referred to is a copy of that entry, date and all, it is difficult to understand how the discrepancy between it and the defendant's evidence, as to time, could have escaped the attention of himself and the plaintiffs counsel, when he, the defendant, was testifying, with the book under his eye, that the broker was instructed, before the 27th of *October*, to carry out a regulation or order which, if the plaintiffs contentions be true, had no existence till the 31st day of that month. If the defendant told the truth, and I do not think that there is evidence to justify a contrary conclusion, the policy was made out in accordance with the terms upon which the underwriters were prepared to effect insurances for all parties at the time that the plaintiffs applied for theirs. The policy with the condition mentioned was received by the plaintiffs some time after it was applied for. In *June* they were again noti-

fied of the condition, but they took no effective steps to rectify the error, if error there was, nor to protect themselves in any way till not only the *stipulated* time to bring the action had expired, but till their right of action, if any, was nearly barred by the statute of limitations as well. I think that the learned Judge who tried the cause correctly construed the policy, and that his judgment on that point cannot be questioned.

It is therefore not necessary that I should dwell long upon the question of waiver which has been raised. The resolution of *March*, 1867, even if the defendant had been a party to it, could not be said to be a waiver of the condition to bring the action within the twelve months. The plaintiffs, *then*, had ample time to bring their action before the expiration of that period. The resolution says nothing as to time, and it is quite clear that it had reference, exclusively, to the *justice* of the plaintiffs' claim, which claim was resisted by, at least, the directors who never agreed to pay it; not, however, on the ground of the expiration of the time to bring the action, but on some other ground—possibly that of the violation of the condition not to proceed to *South Greenland*. The second resolution is in words nearly the same as the first, but the twelve months had expired before it was passed; and if the defendant's concurrence in that resolution had been proved, the case would have been different, although by no means clear. But it does not appear that he was present when either of the resolutions was passed, or that he ever agreed to any of them. I refer to the last resolution as if it had been authenticated (which was disputed at the argument), because it was hinted from the Bench that an opportunity would be given to prove it, if justice would be thereby promoted. The defendant testified that the directors, of whom he was one, never consented to waive the condition nor promised to pay; and as the liability of the underwriters is not joint but several, "each one for his own part,"—"each for the sum opposite his name," I do not see that any act or resolution of any other or others could bind the defendant without his own concurrence, or could be held to have waived his existing rights any more than to create new obligations against him. I am of opinion that the *rule nisi* for a new trial ought to be discharged.

WEST v. MATHESON ET AL.

J. R. McL. being entitled, by right of his wife, to an interest in certain real and personal property, being an estate of which M., the wife, was one of the heirs, they joined in a mortgage to plaintiff of all their said interest. On plaintiff seeking repayment of the amount loaned, defendant, one of the executors of the said estate, resisted the claim on the ground that six years previously J. R. McL. and his wife had conveyed all their interest in said estate by deed poll to her mother. This deed was never recorded, and the plaintiff did not know and had no means of knowing of its existence. The mother, although aware of plaintiff's mortgage at the time it was made, concealed from him the fact of the deed to her.

Held, That having so concealed from plaintiff what it was her duty to reveal to him, the mortgage should be given priority over the deed poll, and plaintiff's claim satisfied out of the estate.

DESBARRES, J., now, (January 12th 1874,) delivered the judgment of the Court, as follows:—

This case comes before us by appeal from an order of Mr. Justice *Ritchie*, dated 23rd April, 1871, who was formerly engaged in it as counsel, and made the order appealed from *pro forma* by agreement and with the consent of the parties and their counsel for the purpose of enabling them to bring the case under the consideration of this Court.

The plaintiff's writ sets out that *George E. Bissett*, late of *Halifax*, deceased, by his Will bearing date 26th day of February, 1861, gave and devised to his daughters *Melinda Azelina* and *Mary Anna*, and his sons *Edwin Gray* and *Henry Edward*, all his real and personal estate whatever, subject to the directions and provisions of said Will, and not therein specifically devised, to them, their heirs and assigns forever, to be paid, as thereafter provided, on the day when testator's son *Henry* should be twenty-one years of age; and the testator by his Will directed that on the decease of his wife all monies invested and all property secured for the payment of the annuity given her by said Will, and all sums remaining unpaid on such annuity shall be divided among his children *Melinda*, *Mary*, *Edwin* and *Henry*, or the survivors of them, share and share alike, and the said testator, by said Will, empowered his executors, for the purpose of carrying out the several trusts therein, to rent, lease, sell or dispose of all or any of his real estate in the County of *Halifax* as to them might seem best. That *Melinda Azelina Bissett* afterwards intermarried with *James R. L. McLean* and by indenture bearing date 26th March, 1868, they said *James R.*

L. McLean and *Melinda* his wife, in consideration of the sum of \$6,300, granted and conveyed to the plaintiff, his heirs, &c., all the estate and interest of her the said *Melinda McLean*, of, in and to the real and personal estate of the said *George E. Bissett*, which was devised to her by said Will, including her estate and interest in house and lot on the north side of *North Street*, and the brewery on the west side of *Lower Water Street*, both in the city of *Halifax*, and also all sums of money, mortgages, and personal property set apart to secure the annuity given by the said will to the said *Martha Mona Bissett*. This indenture contained a proviso for making it void upon payment by *James R. L. McLean*, his heirs, &c., to the plaintiff the consideration money in three years from the date, with interest. That the executors have sold and converted into money all the real and personal estate of *George E. Bissett*, which was devised to her by said Will, and which was conveyed to the plaintiff by said indenture of the 26th March, 1868. That there has been paid to plaintiff on account of said principal sum of \$6,300 the sum of \$1,795, leaving the sum of \$4,505, with interest thereon from April 23rd, 1871, till payment, remaining unpaid and due to the plaintiff, which he prays the executors may be desired to pay.

The answer of *Donald Matheson*, one of the defendants in this suit, is that previous to the making of the mortgage by *James R. McLean* and *Melinda A. McLean*, to the plaintiff, as declared on in this writ, on the first day of *January*, 1862 *James R. McLean* and *Melinda McLean* made and executed to *Martha M. Bissett* a certain deed poll, or instrument in writing, under seal, by which they, in consideration of *Martha M. Bissett*, the mother of *Melinda A. McLean*, having on that day sold to the said *Melinda A. McLean*, in fee, all the lands, &c., at *River Burgeois* occupied by *James R. McLean*, and formerly occupied by *George E. Bissett*, deceased, for the consideration, among others, of £2,000 and interest from that date, to be paid out of the monies and interest which said *Melinda A. McLean* had in the estate of *George E. Bissett* under his Will, they, *James McLean* and *Melinda McLean*, assigned, transferred, and made over to *Martha M. Bissett* and her assigns all the right, estate, share, interest and property which *Melinda McLean* or her husband then had or thereafter

might have to the full sum of £2,000 and interest thereon, to and in the estate or effects of *George E. Bissett*, deceased, under his Will, and a proviso that if *James McLean*, for said *Melinda McLean*, or either of them should at any time thereafter during the lifetime of *Martha M. Bissett* pay or cause to be paid to her any sum in discharge or liquidation of the sum of £2,000 and interest thereon, then the right and demand of *Martha M. Bissett* out of the share and demand of *Melinda McLean* shall be only for such sum as might remain due on said £2,000 and interest thereby assigned. That previous to the making of the indenture of mortgage by *James R. L. McLean* and *Melinda A. McLean* to the plaintiff, and on the day of the date of the deed poll, *James R. L. McLean* and *Melinda McLean*, by their order or writing under seal, directed to the executors of the Will of *George E. Bissett*, authorized and empowered the executors, or any one of them, to hold, detain, transfer and pay over to the said *Martha M. Bissett*, as she might direct, out of the share, interest, monies or estate of *Melinda McLean* pertaining to her out of the estate of *George E. Bissett*, by value of his Will, the full sum of £2,000 and all lawful interest thereon, subject to any payments that might be made thereon to said *Martha M. Bissett*, and further directed that the holding or paying over all or any part of said £2,000 and interest by said executors should be as if paid or held under the Will for said *Melinda A. McLean* and *James R. L. McLean* in fulfilment of their trust as executors. That the interest of *Melinda A. McLean* in her father's estate so assigned, became a part of the assets of the estate of *Martha M. Bissett*, now deceased, by whose Will *Melinda A. McLean* and *George E. Bissett*, *Maria Sophia Matheson*, *Edwin G. Bissett*, *Henry E. Bissett* and *Mary A. Bissett* were, after payment of certain legacies, made the residuary legatees of the estate. That the estate of *Martha M. Bissett* has not yet been settled and closed, and he, *Donald Matheson*, has no means of ascertaining what amount will be coming to *Melinda A. McLean* therefrom under the provisions of her Will.

The other executors, *Charles D. Hunter* and *Peter McGregor*, for answer say that being aware of plaintiff's claim and not knowing whether it was a claim which could be

substantiated, and it being a matter of indifference to them personally, or as executors of *George E. Bissett*, whether the money in their hands or any part thereof should go to pay the plaintiff's demand or not, and as the other children claimed that they were entitled, as representatives of the widow, thereto, and not being desirous of aiding either of the parties to such contestation by any collusive proceedings, did set aside the sum of \$5,000, which sum they believed would be due and payable to the said *James R. L. McLean* and *Melinda McLean* out of the estate of *George E. Bissett*, and by the advice and with the sanction of the Judge of Probate, and upon the statement of the said *Donald Matheson*, who alone of the executors had cognizance of the accounts and assets of the estate, did pay and deposit the sum of \$5,000 into one of the banks at *Halifax*, intending it to remain on deposit until the contestation between the said plaintiff and the other parties claiming might be arranged or settled by a judicial decision. And lastly they say that inasmuch as *Donald Matheson*, their co-executor, is a party to this suit, and is one of the parties interested in right of his wife in the funds, in case the plaintiff shall not establish his claim, they therefore neither admit or deny the plaintiff's claim.

The question, therefore, for our consideration is whether the deed poll made by *James R. L. McLean* and *Melinda A. McLean*, his wife, to *Martha M. Bissett* on the 1st of *December*, 1862, or the mortgage executed by them to the plaintiff on the 26th of *March*, 1868, for \$6,000, for money lent to them by him, is to prevail. The first deed was never recorded, and the plaintiff had therefore no means of knowing, and it is clear that he did not know that such a paper was in existence.

It was contended at the argument by defendants' counsel that this deed poll was not a document that required to be registered, but as it was intended to convey all the right and share of *Melinda A. McLean* as well in the real as the personal estate of *George E. Bissett*, I must express my dissent to this view of the subject. The fact of this deed having been made was concealed from the plaintiff by *James R. L. McLean* and his wife, who are now endeavoring to invalidate their own deed given to the plaintiff in security for money actually lent

to them, in order that they may come in with others as residuary legatees of *Martha M. Bissett* and get a part of the very money borrowed by them, which they desire to retain to constitute assets of the estate of *Martha M. Bissett*. The attempt made by these legatees to prevent the plaintiff from recovering an honest debt is one that cannot receive any encouragement here. This deed poll was made nearly six years before the loan of the money was obtained by *James R. L. McLean* and his wife from the plaintiff, yet the fact of its existence was not only concealed from the plaintiff by these parties, but by *Martha M. Bissett*, who, while she had it in her hands, permitted the plaintiff to advance \$6,000 to her son-in-law on the security of the interest or share her daughter had in her father's estate without ever giving the plaintiff the slightest intimation that her daughter's share and interest in that estate had previously been conveyed. This either shews that she did not consider the deed poll as of any validity, or if she did consider it valid, then it was the concealment of a fact she was bound in common honesty to reveal.

There is no evidence to show that the paper writing addressed to *Martha M. Bissett* and the executors was ever acted upon by either *Martha M. Bissett* herself or the executors, and it seems to have been unnoticed until this suit was brought forward, with the view to defeat the plaintiff's claim.

The evidence of *William Boak*, taken before a Master or Examiner, has a very important bearing on this case. He says: "When I knew *Martha* she was the widow of *George E. Bissett*. She was then residing in *Halifax*. On two or three occasions I had conversation with her respecting the money lent on the mortgage to *Mr. West*. Shortly after the money was lent she came to my office and asked me if *James McLean*, her son-in-law, had got the money. I told her he had. In *July*, 1868, previous to going to *River Burgeois*, I called at her house and I saw her and had a conversation with her. She told me that she had sold to *McLean*, her son-in-law, the old *Bissett* house and store, and had taken a mortgage on the place as security for payment, and asked me to ascertain if that mortgage was recorded. She had given it to *McLean* to take it down to record it. I asked her if she had

any other security from *McLean*. She replied she had not. At the previous interview at my office she mentioned her knowledge of the paper *Mr. Ritchie*, the present Judge, had prepared to make valid the mortgage of her son-in-law and daughter. She said she had agreed to it to enable them to get the money."

It now remains to be considered what effect such an acknowledgment as this is to have upon the deed poll now set up and relied upon by defendants as an instrument to defeat the plaintiff's claim, and show that the mortgage executed to him by *James McLean* and his wife is not to operate as a valid conveyance of the right or share of the latter in her father's estate, as devised, and must be regarded as a waste piece of paper, subjecting the plaintiff to the loss of the money he in good faith advanced these mortgagers.

In *Adams on Eq.*, p. 351, it is said the second rule of equity is that "the equity of a party who has been misled is superior to his who has wilfully misled him." At page 352 he says: "The meaning of the rule is that if a person interested in an estate knowingly misleads another into dealing with the estate, as if he was not interested, he will be postponed to the party misled, and compelled to make his representation specifically good." If, therefore, a person intending to buy an estate or to advance money on it, inquires of another whether he has any incumbrance or claim thereon, stating at the same time his intention to make the purchase or advance, and the person of whom the inquiry is made untruly deny the fact, equity will relieve against him; and if he has acquired the legal ownership will deem him a trustee for the puisne claimant. And even though he do not expressly deny his own title, yet if he knowingly suffers another to deal with the property as his own, he will not be permitted to assert it against a title created by such other person. See *Sug., V. & P.*, 429; *Nicholson v. Hooper*, 4 Mylne & Craig, 186, in which the Lord Chancellor says: "A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derived no benefit from the transaction." In *Brincherhoff v. Lansing*, 4 Johnson's Chan.

R., 69, the same principle is laid down by the Chancellor thus : " If a prior encumbrancee be a witness to a subsequent conveyance or encumbrance, and knowing of its contents does not disclose the fact of his own encumbrance, but intentionally suffers the party dealing with his debtor to remain in ignorance, he shall have his encumbrance postponed or barred, because he is thereby auxiliary to an act of fraud." See *Hobbs v. Norton*, 1 Vern., 136; *Hundsden v. Cheyney*, 2 Vern., 150. Again in 1 *Story's Eq.*, section 390, that learned Judge says : " Where a person having an encumbrance or security upon an estate, suffers the owner to procure additional money upon the estate by way of lien or mortgage, concealing his prior encumbrance or security, in such case he will be postponed to the second encumbrance ; for it would be inequitable to allow him to profit by his own wrong in concealing his claim, and thus lending encouragement to the new loan." See *Draper v. Borlan*, 2 Vern., 370 ; 1 P. Will., 393-4 ; *Berrisford v. Milward*, 2 Atk., 49.

These authorities appear to me decisive on the question involved in this case. I am therefore of the opinion that the mortgage declared upon in this suit must be regarded as an operative and valid conveyance to the plaintiff of all the share and interest which *Melinda A. McLean*, at the execution thereof, had in the real and personal estate of *George E. Bissett*, under and by virtue of his said Will, and that the plaintiff is therefore entitled to recover the amount of principal money and interest actually due on said mortgage, together with costs of suit, and that the executors of said Will, the defendants in this suit, are chargeable with and must be desired to pay to the said plaintiff the said principal money, interest and costs, to the extent of the money arising from the sale effected by them, under the provisions of said Will, of *Melinda A. McLean's* share and interest in the said estate, deducting therefrom the costs of *Charles D. Hunter* and *Peter McGregor*, who appeared and answered in this cause by the order of the Court, disclaiming any interest therein the same to be taxed as between attorney and clients

MOORE v. MOORE.

PLAINTIFF and defendant were tenants in common of a certain dwelling-house, and defendant took off the doors and carried them away, broke down partitions and did other injuries to the property, whereupon plaintiff brought an action for trespass against him. Defendant pleaded that plaintiff was not in possession of the house, but that he was and is in sole possession. The jury negatived this plea.

Held, that the action could be maintained, and that the acts of defendant amounting to an ouster, there should be judgment for the plaintiff.

MCDONALD, J., now, (January 12th, 1874,) delivered the judgment of the Court, as follows :—

The declaration in this cause contained two counts in trespass, the first setting forth that the plaintiff was in the possession of the one-half part of a dwelling house at *Moore's Island*, in this county, where he was carrying on a large business ; that he had several fishing nets and other personal property in the house at the time ; and that the defendant unlawfully broke and entered the premises, pulled down the partition, removed the doors, and kept the plaintiff out of the possession and use of both the real and personal property. The second count is somewhat similar to the first, and as stated by the defendant in one of his pleas, both are for the same cause of action.

The defendant's first, third, fourth and fifth pleas amount to a denial of the alleged causes of action ; but in his second plea he says that the plaintiff was not in possession of the half the house, as alleged, but that the same was and is in the possession and occupation of him the defendant.

There can be no doubt that at the time of this alleged trespass the plaintiff and defendant were tenants in common of the house, and as such were in possession of it, but there is nothing to show that the defendant had any interest in the personal property.

There was no evidence of trespass to the personal property, as the only witness who undertook to charge the defendant with that injury was the plaintiff, and he admitted, on cross-examination, that he did not see the defendant do any of the acts of trespass referred to in his direct examination. There is, however, abundance of proof of injuries committed by the defendant to the dwelling house. *Isenhaur* saw him take the door off the hinges, nail up the place, and throw boards out of

the house. *Traley*, who lived with the defendant, says that he broke down the partition inside, and that he, the witness, helped to carry them away by his directions. *Smetzler* says that he saw him nail up the door and take the partition out ; that he gave them to *James Troop*, and that the door and partition were taken up the Bay in defendant's shallop. Even the defendant himself says : " I took the partition down and broke the door off the hinges."

There can be no doubt that if the defendant had been a stranger, the plaintiff must have recovered, and the question now is whether, the tenancy in common having been established, the plaintiff has proved such ouster or such destruction of the common property as will enable him to recover against his contestant.

In actions of trespass to the freehold by one tenant in common against another, it is not necessary to show an entire destruction of the subject matter of the tenancy in common. The case of *Wilkinson v. Haggarth*, 12 Q. B., 839, seems to me to have a very important bearing upon this, as it shows that one tenant in common may not destroy a part of the freehold, as by digging turf and carrying it away ; that this form of action can be maintained for such injuries, and that one tenant in common has sufficient possession to maintain trespass against his co-tenant ; for (to use the words of Lord *Denman* in his judgment,) " if possession in such case imparted exclusive possession, one tenant in common might destroy the subject matter of the tenancy in common for his own benefit, and his co-tenant be without a remedy. The case of *Steadman et al. v. Smith*, 8th Ellis & Blackburn, p. 1, is also important in this enquiry. There the occupation of the whole width of the wall in one place—the wall being the common property of both—and an inscription upon one of the stones claiming the property as that of the defendant was held to be sufficient evidence of actual ouster. The digging up of turf and taking it away does not appear to me to be more a destruction of property than the pulling down, without any intention of replacing them, of the doors and partitions of a dwelling house, and as one of the witnesses, uncontradicted by the defendant, testified was done in this case, giving the boards away to a third party. It is not often that an act is done

less consistent with what I conceive to be the rights of co-tenants than those to which I have just referred,—rendering, as the defendant must have done, comparatively uninhabitable the dwelling house held in common. If the plaintiff could not maintain trespass in this case I do not see that he could do so in case the defendant had torn up the flooring, pulled down the flues, and taken out the windows and given them away to a third party, in addition to what he did. Surely the mere digging of a hole in the ground would not be a more serious interference with the rights of a co-tenant, nor stronger evidence of destruction of property, or of ouster than what was done by the defendant in this case.

It is true that, in the case of *Cubitt v. Porter*, 8 B. & C., 257, (decided in 1828,) *Littledale, J.*, expressed a doubt as to whether an action of trespass could be maintained by one tenant in common against another in any case; but more than twenty years later, *Coltman, J.*, giving judgment in the case of *Murray et al. v. Hall*, 7 M. G. & Scott, p. 441, said it was unnecessary to give an opinion as to whether tenancy in common should have been specially pleaded by the defendant, for that the Court were of opinion that the defence was not sustainable. The learned Judge said: "It appears to us difficult to understand why trespass should not lie, if ejectment, which includes trespass, may be maintained—as it confessedly may—an actual ouster. There can be no doubt now that trespass may be maintained by one tenant in common against another." In the present case the plaintiff alleged that he was in possession of the one-half part of the house in question, but did not say that the defendant was not also in possession with him. The defendant pleaded, not tenancy in common, but a plea that is quite inconsistent with that relationship, that is, that the plaintiff was not in possession, but that he, the defendant, 'was and is.' In an action of ejectment, under our practice, a plaintiff tenant in common, the same as any other plaintiff, declares that the defendant withholds the possession to which the claimant is entitled, but that does not necessarily mean that he alone is entitled to the possession, and if the defendant relies upon tenancy in common as a defence he must plead that fact, and deny ouster. The jury in this case found the fact of possession by both,

and negatived, not the plaintiff's declaration, but the defendant's plea, which denied the plaintiff's possession altogether. In the cause *Mason v. Farley*, 12 M. & W., 674, it was held that in detinue the defendant cannot under a plea of *non detinet* and not possessed show that he had a common interest with the plaintiff in the property, and that such defence ought to be specially pleaded.

It appears to me that, in an action like this, when a defendant, tenant in common, relies for defence upon the exercise of his right as such, it would be in accordance with the spirit of our *Practice Act* that he should plead the tenancy in common, giving the plaintiff an opportunity of replying such matters as would put directly in issue the real question to be tried. But I do not think that it is necessary to decide that question in this case, as the defendant, having done more than the exercise of a right as a co-tenant, could not justify his acts under any plea, and, as in the case of *Murray et al. v. Hall*, such defence would not be sustainable.

With all deference for the opinions of the learned Judge who tried this cause, I am of opinion that the plaintiff had sufficient possession to enable him to maintain trespass against his co-tenant, and that the jury ought to have been so instructed. For the reasons given I think there ought to be a new trial.

LOOMER ET AL. v. STARR ET AL.

DEFENDANTS instructed their agents at New York to charter a ship to carry certain goods thence to Sydney, C. B. The agents chartered plaintiffs' ship, and the voyage was carried out and the goods duly delivered, and received by defendants. On the way to Sydney the vessel called at Halifax, where one of the defendants, who had previously received the charter-party, visited her. He was also present at Sydney when the goods were delivered. On neither occasion did he make any objection to the freight payable under the charter, but subsequently refused to pay it on the ground that the rate was too high, and that his agents had exceeded their authority in entering into the charter-party at that rate.

Held, that not having made any objection either at Halifax or Sydney, although fully acquainted with the rate of freight agreed to be paid, and having received the full benefit of the contract, he had thereby ratified it, and must fulfil his obligations thereunder.

MCDONALD, J., now, (January 12th, 1874,) delivered the judgment of the Court, as follows:

In this action the plaintiffs seek to recover from the defendants an amount alleged to be due, under a charter party,

signed by *D. R. DeWolf & Co.*, for the defendants, as their agents in *New York*, and by *Benjamin Hatfield*, then master of the brig *Prince LeBoo*, on behalf of the plaintiffs, by which charter party it was agreed that, in consideration of \$1,200, the plaintiffs should charter the vessel to the defendants from *New York* to *Sydney, C. B.*, to take fifty coal cars, to be landed at the pier of the *C. B. Coal Company*, at *Sydney*, the vessel to have the privilege of loading for *Halifax* a cargo sufficient to fill up,—the freight to be for the vessel's benefit.

The declaration contains a count on the charter party and also a common count for freight, to which the defendants pleaded that they did not agree as alleged, and denying the indebtedness.

A verdict was returned for the plaintiffs, and a rule nisi taken under the statute to set it aside.

On the trial the main defense was a denial of *DeWolf & Co's* authority to bind the defendants, as they undertook to do, they, (the defendants) while admitting a written authority to charter a vessel without any limitation as to the amount of freight to be paid, insisting that after the authority was given, one of them, orally, instructed the agents not to undertake to pay, as was said, any amount exceeding \$400, and that the agents, having exceeded that direction, they (the defendants) were not bound by the agreement.

Evidence was tendered at the trial to support that statement, but it was rejected by the learned Judge who tried the cause. It was also attempted to be shown that there was collusion between the agent and the plaintiffs. The letter authorizing the chartering of the vessel is dated at *Halifax*, April 11th, 1874, and the part of it which is material to the question of limited authority, reads as follows: "Should the *Taylor Iron Works* have the cars completed shortly it will be necessary to have a vessel at once, and we will trust to you to engage one for us on the lowest and best terms you can." About the 27th of the same month the defendant (*John Starr*) was in the agent's office in *New York*, and it was there that the conversation took place, his version of which was tendered in evidence and rejected by the learned Judge. After his return home, *Mr. Starr* wrote again to the agents,

another letter, instructing them to ship the cars to order, to be delivered at the pier of the *C. B. Coal Company*, and not to put the rate of freight in the bill of lading, but make it payable as per charter party, and concluding by saying, "I trust you have engaged a vessel at a low rate and will get them off soon." The vessel arrived in *Halifax*, and *Mr. Starr*, who was examined as a witness, admits that while in *Halifax* he went on board of her, having previously received a copy of the charter party, and that he afterwards proceeded to *Sydney* to meet her and saw the first part of the cargo discharged, as agreed by the charter party, and it appears that he never said a word by way of objection, nor told the captain or any of the plaintiffs, either at *Halifax* or *Sydney*, that he objected to the charter party, or that the agents went beyond their instructions.

There was a great mass of testimony produced, taken under a Commissioner, very little of which had any bearing upon the real questions involved, but the leading facts are those to which I have referred.

It was urged at the argument, as I stated, that there was collusion between the plaintiffs and the agents, and all the evidence tendered on that point was received, but I fail to see that it sustains that view; nor is there any plea of fraud pleaded to avoid the agreement.

Upon the question of the agents having exceeded their authority, we have seen that the first authority was a written one, which, for any thing that appears in evidence, may or may not have been seen by the master before signing the charter party; but it is quite clear that the master was never told that there was any limitation to that authority. *De Wolf* swears that there was no such limitation, and he therefore could not be supposed to have communicated to the master what he says did not take place. We have two letters of the defendants,—the first authorizing the agents to charter a vessel at their discretion; the other, *after the date of the conversation*, expressing a hope that a vessel was engaged *at a low rate*,—neither of them stating any amount. But what seems to me to be decisive, is the important fact admitted to be true, that, before the vessel arrived in *Halifax*, the defendants had received a copy of the charter party, that *Mr. John*

Starr, one of them, went on board of her at *Halifax*, allowed her to proceed to *Sydney* to complete her voyage, which he must have known she would only have completed under the charter party; that he went to *Sydney* to meet her and saw the first part of the cargo discharged at the very place agreed upon with the agents, and, during the whole of that time, not one word was said by way of objection or caution to the master or any of the plaintiffs; but, by concealing from them what is now called the truth, the defendants induced them to complete the voyage at much additional cost and loss, and caused them, as may reasonably be assumed, to occupy an entirely different position (to their disadvantage) from what they should have occupied if the defendants' present contention were true and had been made known to the master, as in such case it should have been, while he was in *Halifax*.

Story, in his work on Agency, section 253, says: "If an agent who is employed to purchase goods at a limited price should exceed that limit, and the principal, after full knowledge of the facts, should receive them on his own account, without objection, it would be presumed that he intended to ratify the transaction." At section 258 he says: "Silence operates as a presumptive proof of ratification, depending upon the circumstances." Again, in the same section he says that the presumption seems now, in favor of commerce, to be universally acted upon, and therefore if the principal does not, within a reasonable time, express his dissent to the agent, he is deemed to have approved of his acts, and his silence amounts to a ratification of them. Here the defendants accepted the goods, after permitting the plaintiffs, without warning, to complete their part of the agreement. At *Halifax* the circumstances then known to the defendants, but unknown to the plaintiffs, regarding them from the defendants' point of view, were such as required an open, candid statement of the facts to be communicated to the master, and that, surely, was the reasonable time to do so. The defendants allege that their agents did not follow their instructions, and the result was, if that were true, that the plaintiffs, without any fault of theirs, were put to the expense of taking the cars to *Halifax*, without any prospects of being remunerated, if the law be as

the learned counsel for the defendants contend it is. That would have been a hardship that no owners of vessels would like to endure, and surely it would furnish no reason to justify the defendants in inflicting an additional injury upon the plaintiffs by concealing the truth at *Halifax* and so inducing them to incur so much more loss and expense as was necessary to carry their property from *Halifax* to *Sydney*. The principal cannot ratify that part of a transaction which makes in his favor without incurring the responsibility of the whole, whatever may be his innocence in the limitations imposed on the authority of the agent. *Udell v. Atherton*, 1st Smith's Leading Cases, 7th American Ed., 342-343, and the authorities there collected. He must elect either to affirm or disaffirm it altogether. He cannot adopt that part of it which is for his own benefit, and reject the rest. 2nd do., p. 133. Even where he knows that there was fraud in the transaction which would enable him to avoid it, if he treat it as a subsisting contract he cannot afterwards avoid it. If, having the right to repudiate or affirm a transaction, he take the latter course, he cannot afterwards recur to his right of repudiation. (134.)

It is impossible to see how the defendants here could by their conduct, and without express terms, have done more than they did to treat the charter-party as a subsisting agreement, and that, too, to the prejudice of the plaintiffs.

The defendants, by their conduct, acquiesced in the completion of the voyage under the charter-party, took the benefit of the agreement without objection, and offered no remuneration whatever, because, as they say, *their* agents in *New York* did not do their duty. If the agents cancelled their instructions from the master, they did what was wrong, but they only did, in *New York*, what the defendants themselves did from the time the vessel arrived at *Halifax* till they got their goods safely landed at *Sydney*, and the freight had to be paid. This is the state of the case on the defendants' own shewing, and it is unnecessary to say that if there was law to support such a defence as they have set up, it would be the very reverse of justice.

But the plaintiffs do not admit that the facts are even so favourable to the defendants as I assumed them to be in the

observations just made; for it is denied that there was any oral limitation whatever to the first authority given. It is true the evidence of *Mr. John Starr* was tendered to shew that there was such limitation; but assuming that evidence to have been received, how could it effect the case in the face of the written letters, the defendants' proved dealing with the master, their acceptance of the benefit of the agreement without objection, and the fact that *Mr. De Wolf* swears that there was no limitation, corroborated as he is by *Mr. Marshall*, who was his partner and was present at the conversation referred to, and certainly not contradicted, if not corroborated, by *Mr. Rober*, the defendants' own witness, who was also present? Is it not quite clear that, if *Mr. Starr's* evidence had been received, and a verdict rendered in favor of the defendants, it would certainly have been set aside as an improper verdict? If so, of course, no new trial would ever be granted on the grounds that *Mr. Starr's* evidence was improperly rejected. The rule *nisi*, I think, must be discharged with costs.

DECISIONS
OF THE
SUPREME COURT OF NOVA SCOTIA,
JULY TERM, 1874.

STEPHENS v. TWINING ET AL.

T. A. and J. A. were entitled to receive grants of certain Crown Lands upon which the price had been paid to the Government. Before taking out their grants they mortgaged their rights to plaintiff. Subsequently they became insolvent, and made a general assignment to defendants for the benefit of their creditors. The defendants, as such assignees, applied for the grants and had them made out to themselves, selecting lots in different localities from those indicated in the original application, but the money paid for them was that paid on the original application. On the plaintiff seeking re-payment of the amount loaned by him to T. A. and J. A., the defendants refused to satisfy his claim.

Held, that as assignees of the A.'s, they had only succeeded to such rights as the A.'s possessed at the time of the assignment, and those rights having been mortgaged to plaintiff, his claim should first be satisfied before they could deal with the land granted to them.

RITCHIE, J., now, (July 21st, 1874,) delivered the judgment of the Court, as follows :—

The claim of the plaintiff in this suit is founded on a mortgage made to him by *Thomas Archibald* and *John Archibald*, bearing date 15th February, 1867, whereby, among other property, they conveyed to him what is now in controversy in these words: "Two-third parts of all those several lots of ungranted land applied for and paid for at the Crown Land Office by *Stephen Krackowiser*, *Adolph Guzman* and *Francis Ellershausen*, amounting to 4,000 acres, on or near the *St. Croix River* and *Panuke Lakes*, the right or title to receive grants of such lands having been secured by the said *Francis Ellershausen* from the Crown and from the said

Stephen Krackowiser and Adolph Guzman, and by the said Francis Ellershausen transferred to the St. Croix Manufacturing Company," (the said *Archibalds* having become interested therein to the extent of two-third parts) which mortgage was subject to a proviso that it should become void on payment to the plaintiff of \$3.101.25 and interest by two equal instalments at 9 and 18 months after the date thereof.

The application by *Krackowiser, Guzman and Ellershausen* had been made in *July* and *August*, 1863, and \$1,320, the price of the land, was then paid by them under chapter 26 *Revised Statutes*, whereby it is enacted that the Governor-in-Council may settle the price of crown land and the mode of making application therefor, and that any person, upon due application to the Commissioner of Crown Lands, may become the purchaser upon making immediate payment therefor to the Receiver-General.

On or about the month of *October*, 1867, the Messrs. *Archibald* became insolvent, and assigned all their real and personal estate to *Edmund C. Twining, Charles J. Wylde and John B. Campbell*, in trust for the benefit of their creditors, all of whom accepted the trust; but *Campbell* has departed this life since the commencement of this suit.

At the time of the insolvency and assignment the grants, which had been applied for, had not been taken out, and the assignees assumed the right, under the general assignment made to them, to have granted to them, and they applied for and obtained four grants, dated severally the 19th *October*, 1868, comprising 2,278 acres; they having, with the permission of the Commissioner of Crown Lands, selected the lands to be comprised in the grants,—two lots in the County of *Hants*, one in the County of *Halifax*, and one in the County of *Lunenburg*. These lots were selected in somewhat different localities from those indicated in the original applications, but the application of the assignees for the grants and the selection of the lands were based on the original application, and the money paid for the lands so granted was the money paid in on such original application; and the defendants, *Edmund C. Twining and Charles J. Wylde* now claim that the money so paid passed to them under their assignment, as well as the right to obtain the grants on account of which it

was paid, and to hold the land so granted for the benefit of the creditors of the *Archibalds*, unaffected and unencumbered by the mortgage held by the plaintiff. The portion of the money so appropriated was \$1,002.32.

The plaintiff by his writ claims to have been interested in two-thirds of the money so appropriated by the assignees, as well as in two-thirds of the balance of the \$1,320, and he claims that the lands comprised in the grants obtained by them should be held subject to his mortgage, and he prays that the assignees may be declared to hold two-thirds thereof as trustees for him, to the extent of the amount due on his mortgage, and that they do pay him the amount of principal and interest due thereon, and that in default thereof that a decree of foreclosure do pass, and the lands be sold and the proceeds applied to the payment of his mortgage and costs, and that the balance of the money paid to the Commissioner of Crown Lands, amounting to \$317.68, and the right of pre-emption of land secured thereby be declared subject to the plaintiff's mortgage.

The defendants, *Twining* and *Wylde*, by their pleas, admit that their application for the grants in question was made by them, not in their own interest, but as assignees and acting for the benefit of the creditors of *F. & J. Archibald*, and in the belief that the money which had been originally paid for the purpose of obtaining grants of land belonged to the estate of the *Archibalds*, and they appropriated a portion of it in payment for the lands applied for by them, which they caused to be surveyed and run out and granted to them in different localities from those specified by the original applicants in their applications, and in ignorance of the claim of the plaintiff under his mortgage. The other statements in the pleas were either irrelevant or unsustained by proof.

These defendants, according to their own shewing, occupy the position which the *Archibalds* would have done but for the assignment. They do not pretend that they made the application for the grants independently of those which had been previously made; and *Twining*, one of the defendants, says truly in his affidavit: "That they would not have been justified in speculating with the funds of the creditors in purchasing lands from the government, and that they had, in

fact, no funds for that purpose, but they felt themselves authorized to apply for and take out grants for the benefit of the creditors *which had been paid for by the insolvents.*"

That they had the right of doing so cannot, I think, be questioned, for the plaintiff could only claim a right to a lien on the lands as a security for his debts, and as it would not have been in contravention of his rights for the *Archibalds* to have taken out grants in their own name before the assignment, so after it their assignees would have the right to have the land surveyed and granted to them, and the money deposited in payment applied to that purpose; but, whether this were done by the one or the other, it could only be done subject to the rights of the plaintiff under his mortgage.

For the *Archibalds* to have attempted to evade the effect of their mortgage by applying to the Commissioner of Crown Lands for permission to take up lands in other localities than those indicated in the original applications, and appropriating the money in payment of them, and then contend that the mortgage did not apply to such lands, would have been a fraud on the plaintiff, and as I think the *Archibalds* could not do this, so I think their assignees could not, without violating the rights of the plaintiff.

Under an application to the Commissioner of Crown Lands for a grant of land and the payment of the price required by the government, the applicant does, in my opinion, acquire rights under the Act I have referred to, not that he would thereby be necessarily entitled to a grant, for there might be good reasons which would justify the government in withholding it, but I cannot bring myself to the conclusion that, as contended on the argument, he has no rights, legal or equitable, and that after due application and payment of the purchase money the Commissioner of Crown Lands can arbitrarily prefer a subsequent application. The whole scope and terms of the Act lead me to the inference that the legislature intended that, as between subject and subject, a right of pre-emption should be acquired by the first applicant who had fulfilled all the requirements of the law; and in the present case, whatever the rights of the *Archibalds* were to the grants or to the money paid in as the price of the lands,

those rights were pledged to the plaintiff before their assignment to the defendants.

Passing for a moment from the claim of the plaintiff under his mortgage, what is the nature of that set up by the defendants to these funds and to the lands purchased with them? They hold a general assignment from the *Archibalds*, having no special reference either to the money or the lands. Upon what principle can they seek to take them from another party to whom they had been previously specifically assigned, certainly more specifically than to them, as a security for a debt, the justness of which is not called in question, nor is the *bona fides* of the mortgage. How is theirs the preferable title? They could take no more than the *Archibalds* had to give them, and if the latter would had been estopped from denying the rights of the plaintiff under his mortgage, so are their assignees.

If it were necessary to refer to any authority to shew that the assignees under a general assignment can only take such rights as the assignor or debtor had at the time of the assignment and subject to all previously existing rights and liens, see *Sug. Vend. & Purch.*, 570, Eng. Ed.; *Story's Eq.*, sections 10, 38; *Picking v. Infracomb Railway Co.*, L. R., 36, p. 257.

The plaintiff having a lien upon two-thirds of the lands comprised in the said grant for the debt due him and intended to be secured by the said mortgage, an order will pass, in case the amount thereof is not paid to him by the said defendants, *Edmund C. Twining* and *Charles J. Wylde*, the assignees of *T. & J. Archibald*, that the said two-thirds of the said lands be sold, and that out of the proceeds the amount due the plaintiff for principal, interest and costs be paid to him, and the balance, if any, be paid to the said defendants.

In case there should be any dispute as to the amount due on the mortgage, reference shall be made to a Master to settle the amount.

THERIAN ET AL. v. BELLIVEAU.

PLAINTIFF brought an action against defendant for trespassing upon his land and premises, and at the trial proved a clear documentary title, as well as title by uninterrupted possession for a long series of years. Defendant pleaded title in himself as well as a right of way for the public over the land, but failed to support either plea. The jury having found a verdict for plaintiff,

Held, that it could not be disturbed.

DESBARRES, J., now, (August 15th, 1874,) delivered the judgment of the Court, as follows:—

This was an action of trespass for breaking and entering on Lot No. 16, at *Belliveau Cove*, in the County of *Digby*, and destroying plaintiffs' fences, &c. To this action no less than twenty-six pleas were put in, of which it is only necessary to notice such as raise the material issues in the case, viz., the 1st and 2nd pleas, denying the trespasses, 3rd and 4th, denying the land to be the plaintiffs', and that they were possessed of it, and the 5th, claiming a right of way over the *locus* on foot and with cattle, &c., for 20 years, and justifying the knocking down and destruction of the fence as an obstruction. The rest, with the exception of the 25th plea, which is a plea of leave and license, &c., being a repetition of the 5th plea, in all the various forms which the ingenuity of the pleaders's mind could suggest, I need not refer to, as it would be a waste of time to do so.

The case was tried before Mr. Justice *McCully*, at *Clure*, in *September*, 1873, upon whose recommendation it was agreed that a verdict should be taken for plaintiff for \$1, subject to the decision of the whole Court, who were to draw their own conclusions from the evidence and have power to order a nonsuit or direct a verdict to be entered for defendant, as the Court should be of opinion the merits of the case required.

Having carefully read the learned Judge's report and considered the evidence produced on both sides, I have arrived at the conclusion that the verdict in this case ought not to be disturbed. The plaintiffs derive their title under a grant from the Crown, dated 29th *June*, 1775, and under the several *mesne* conveyances, &c., made of the land down to that under which they immediately claim. It appears from this grant and the plan annexed to it that Lot No. 15. containing 200

acres, was granted to *Isarion Terrio*, and that Lot No. 16, together with a marsh, Lot No. 29, containing in the whole 160 acres, was granted to *Pierre LeBlanc*; the front of one-half of Lot 16 being the subject of contention in this suit.

Isarion Terrio, by will dated in 1812, devised to his sons, *Joseph* and *Frederick*, Lot No. 15 in the front and 29 in the rear. On the 5th April, 1821, *Marino LeBlanc* and *Gazeton LeBlanc*, representing themselves to be brothers, and who, though it is not so stated in the deed, may at this distant day fairly be presumed to have been the sons and heirs-at-law of *Pierre LeBlanc*, the grantee, executed a deed to *Joseph* and *Frederick Therian* of Lot No. 16, who then became owners of Lots No. 15 and 16, at *Belliveau Cove*, in the County of *Digby*, fronting on *St. Mary's Bay*. On the 28th January, 1846, *Joseph Therian* executed a deed to his brother *Frederick* of Lot No. 16, then making the latter the sole owner of that lot, and retaining for himself, as it it would appear, Lot No. 15. *Frederick Therian*, by his Will, dated 18th February, 1863, devised to his son *Maximin* half of Lot No. 16, describing it thus: "One-half of the lot where he (*M.*) is settled, that is; on the S. W. side, beginning from the main post road, the whole width of the said lot of land till it comes opposite the N. E. side of said *Maximin's* barn; thence one-half of said lot to be divided in the centre the whole length of said lot as far as the rear. Also all privileges which I own at the front of said lot on the N. W. side of the main road, near the shore." The foregoing are the documents on which the plaintiffs rely as being sufficient to establish a legal title to one-half of Lot No. 16, on which the trespasses complained of are proved to have been committed, but as against the defendant, who has proved no title in himself and given no evidence of dedication of, or user that would constitute a right of way over the land, possession alone might have been considered enough to entitle them to maintain trespass against him. They, however, have not rested their case solely on possession; they have proved a documentary title which leaves no doubt on my mind as to their right as the legal owners of the land to recover against the defendant, who stands in the position of a trespasser and an intruder on their possession.

One of the objections taken to the plaintiffs' right to recover was that there was no proof of any title having passed from *Pierre LeBlanc* of Lot No. 16 to *Marino* and *Gazeton LeBlanc*, and that having no title themselves, they could give none to *Joseph* and *Frederick Therian*. This might have been considered a good objection had there been no possession and no acts of ownership exercised by the latter over the land, but the evidence of the defendant himself furnishes an answer to this objection. At line 171 to 175 he says: "*Joseph* and *Frederick Therian* used Lot No. 16 when I first remember. *Joseph*, *Frederick's* brother, built a vessel there 24 years ago: the last he built; he built two before that." At line 179 he says: "*Frederick* and *Joseph* piled seaweed there." This shows that they claimed and used the land as rightful owners under the deed they held from *Marino* and *Gazeton LeBlanc*, while others who walked over and used it for other purposes, imagining that as it remained uninclosed it must necessarily be public property, were trespassers. It cannot be pretended that any of the acts proved on the part of the defence were such as could at all effect the possession and title of the parties claiming the land, who had a right so long as no adverse holding existed to put up a fence, as the plaintiffs had, to preclude all persons from passing over the land.

Another objection urged on the part of the defendant, which has not been overlooked, was that *Frederick Therian*, the father of *Maximin*, did not devise to him (*M.*) one-half of the front of lot No. 16, lying on the N. W. side of the main road, near the shore, now in dispute, but only the privileges which he owned in that portion of the lot. In devising one-half of the lot on which *Maximin* was then settled, the testator uses the words: "To be divided in the centre the whole length of the lot as far as the rear." Now if this lot was to be divided into two equal parts by a line running through the centre the whole length of the lot, it seems to me to follow as a necessary consequence that it must have been the intention of the testator to give, and that to give effect to the devise it must be construed as giving to *Maximin* the full half of Lot No. 16, including that portion of it near to and fronting on the shore on which the trespass was committed, and as the

deed from *Maximin* to the plaintiffs covers one-half of the lot running from the shore to the rear, I do not think it is an objection that can prevail or affect the plaintiffs' case.

It is not necessary to advert to the evidence produced on the part of the defence with the view of supporting the 5th and 25th pleas. It is enough to say that we think it does not sustain either the one or the other of these pleas. We are all of opinion that the verdict must remain, and that the rule for setting it aside must be discharged with costs.

YOUNG v. DEWOLF.

A rule absolute in the first instance will not be granted to enter judgment upon an award given under a submission which was made a rule of Court.

MCDONALD, J., now (August 15th, 1874,) delivered the judgment of the Court, as follows:—

Mr. Rigby moved for a rule absolute in the first instance to enter judgment upon an award made under a submission, which was made a rule of Court.

The award, among other things, directs that the defendant shall be bound to pay to the plaintiff the balance of the value of deals over \$6,436 in cash, with interest from the 20th day of *January*, 1874, as soon as the plaintiff shall furnish him with a sworn surveyor's certificate of the quantity and correct specifications according to contract,—which certificate the plaintiff in his affidavit says has been furnished.

In *England* the performance of an award made under a submission which has been made a rule of Court may be enforced sometimes by action, sometimes by attachment, and sometimes by execution issued upon a rule of Court which, (under *1 & 2 Vic.*, chap. 110,) when for the payment of money, has, in some cases, for that purpose the effect of a judgment; but whether by attachment or execution, the rule will be a rule *nisi* in the first instance. Our statute provides that obedience to an award made, as the one before us, under a submission afterwards made a rule of Court, may be enforced by the Court directing a judgment to be entered or an

execution to issue for the amount, or otherwise, to carry such award into effect.

If the application in this case were simply for an execution, I think the English practice would be followed, and that a rule *nisi* would issue,—and I see no stronger reason why a rule for judgment should be made absolute in the first instance than one for execution.

This application is founded on affidavits setting forth that certain acts were done after the making of the award, and it will not be denied that the truth of that affidavit must be assumed before judgment can be entered. It would be manifestly unjust to conclude the defendant by entering judgment against him, without first giving him an opportunity to be heard, both as to the facts of the case and the law applicable to these facts. I think the plaintiff should have a rule *nisi*.

MURDOCK ET AL. v. LAWSON ET AL.

WHEN an order of foreclosure and sale of a coal mine was made, B., one of the largest shareholders in the Company owning the mines, applied for an order directing certain coal to be sold first before dealing with the mine itself. The Judge refused to give the order, and B. appealed. The day of sale was fixed subsequent to the term, and with the understanding that if the cause was not reached on the last day of the term, a further postponement of the sale might be moved for. The cause not being reached and argued,

Held, That the sale should be postponed on terms being given by B.

MCDONALD, J., now, (August 15th, 1874,) delivered the judgment of the Court, as follows:—

These suits were commenced to foreclose mortgages of properties known as the *Block House Mines*, in *Cape Breton*, and an order of foreclosure and sale was made by Mr. Justice *DesBarres*, sitting as Equity Judge. An application was made at the same time on behalf of *Mr. Robert Belloni*, one of the shareholders, for an order to sell a quantity of coal taken out of the pit of the mortgaged mine, and to apply the proceeds towards the payment of the amount due on the mortgage, before the mine and other mortgaged premises should be sold. The learned Judge declined to make such order, but granted an appeal from his decision to this Court, and although the causes have been on the docket for argument

during the present Term, they have not been reached. The learned Judge very properly fixed a day subsequent to the Term to be the day of sale, with the understanding that, if the causes should not be reached, counsel would be at liberty on the last day of the Term to move this Court for a further postponement of the sale.

It is not the fault of the appellant that the causes have not been argued, and to allow the property to be sold now would be in effect to deprive him of the benefit of his appeal. Although this may be a hardship in delaying the payment of money which is not denied to be due, I do not see that it can be avoided in this any more than in many other cases of unavoidable delay. I do not think this is the time to enquire whether or not *Mr. Belloni* has placed himself in the proper position to prosecute his appeal with success, though that position was taken on the argument which took place on the application. That he is largely interested in the property and entitled to intervene cannot be denied; and if he has not put himself in the proper position to succeed in his appeal, or if his appeal was irregular, there was a way of taking exceptions to his course, but exceptions have not as yet been taken in the way that I think the law prescribes. It is enough now that there is an appeal pending of which the parties ought to have the benefit, if possible; but while securing to the appellant his legal rights, we should be careful to secure to the creditors their substantial rights.

I am of opinion, therefore, that a rule should pass staying the sale till after judgment shall be given on the appeal, the appellant first giving security by a bond, with two sureties to be approved of by a Judge, for the payment of all the interest which will accrue upon the debt secured by the mortgage during the period of the postponement, and also the payment of additional expenses of advertizing consequent upon the postponement.

MCLEOD v. CAMPBELL.

PLAINTIFF's father mortgaged a lot of land to defendant, and subsequently defendant, with the consent and by the direction of the father, conveyed the lot in fee simple to N. M. After the death of the father, plaintiff brought suit under his will against defendant for the land.

Held, That the father, by consenting to the conveyance of the land in fee simple to N. M., was estopped from redeeming it, and as plaintiff was in no better position than her father judgment should be for defendant.

MCDONALD, J., now, (August 15th, 1874,) delivered the judgment of the Court, as follows:—

The plaintiff claims to be entitled, under the Will of her late father, *Roderick McLeod*, to a lot of land in the County of *Victoria*, of which her father had given the defendant a deed absolute on the face of it, but which deed has been held in equity to be a mortgage at the time of making it. In the decree which established that fact it was held that the mortgagor having, after the making of the mortgage, directed or consented to a conveyance in fee simple of the lands in question, by the defendant to one *Norman McLeod*, was estopped from redeeming the property against *Norman*, who now holds the legal as well as the equitable title. The plaintiff, finding that the deed was decreed to have been a mortgage in the first instance, instituted this suit against the defendant, still alleging herself to be entitled to the land subject to the mortgage, under her father's Will, claiming damages from the defendant for disputing her right, for keeping possession, and for involving her in an equity suit to establish her rights.

The defendant pleaded that he conveyed the property to *Norman McLeod* with the knowledge and consent and by the direction of the testator. And although he first pleaded that the plaintiff did not become entitled to the property as she alleged, that plea was for some reason struck out of the issue.

On the trial it was agreed that a verdict subject, &c., should be taken in favor of the plaintiff for \$500,—the allegations in the declaration and the facts set out in the pleas being admitted on both sides and agreed to be taken by the Court to be true; and all such inferences to be drawn from them by the Court as a jury might draw; and that they

should be viewed in connection with two decrees of the late learned Judge in Equity, in matters in difference between the parties, that were before him ; and to be regarded by the Court as governed by these decrees. The Court to be at liberty to order a nonsuit or to give judgment for either party, and if for the plaintiff for the amount found by the jury, or for any less sum that the Court might consider a proper measure of damages.

It was contended by the plaintiff's counsel that the fee simple is admitted by the pleadings and the agreement just recited to be in the plaintiff as alleged in the declaration. But it must be remembered that although that allegation is not denied in express terms by the defendant's pleas remaining on the issues, all the pleadings are by the agreement to be received in connection with and to be governed by the decrees referred to, which decrees, under the facts pleaded in this cause, settled the point that the deceased was estopped from disputing the legal as well as the equitable title of *Norman McLeod*. The plaintiff is not in a better position than her father was. She got by the decree all that she was entitled to receive, not the land, but the amount found due her upon the accounting, which was the balance of the value of the land ; and she is bound by that decree as well as the defendant is.

But even if the allegations in the plaintiff's declaration were admitted to be true, has she a cause of action ? I think not. If she has, any person who defends a suit unsuccessfully, either in whole or in part, is liable to be sued again for damages because he made a defence,—the moment a judgment is entered against him.

If the plaintiff were to succeed in this case to-day, she might with equal propriety and just as much law commence another action to-morrow to recover damages from the defendant for defending this suit ; and so on as long as the defendant will unsuccessfully resist any claims she may make.

I am of opinion that judgment should be entered for the defendant.

WHITEHEAD v. HOWARD.

THE legal rights of the parties were entirely dependant upon an agreement under seal, and the Judge presiding at the trial instructed the jury that under the terms of that agreement, and the facts in proof, there should be a verdict for defendant, nevertheless the jury found for the plaintiff. On rule nisi for a new trial,

Held, That as the construction of the agreement was a matter for the Court, the verdict should be set aside and the rule for a new trial made absolute.

McCULLY, J., now, (August 15th, 1874,) delivered the judgment of the Court, as follows:—

This was an action tried in *November* last, at *Halifax*, in which a verdict passed in favor of the plaintiff for \$1,500 damages.

A rule *nisi* for a new trial was granted by the learned Chief Justice who tried the cause, on grounds taken for a nonsuit on the trial as being against law and evidence and the Judge's charge, and for excessive damages.

Plaintiff and defendant, by an agreement dated 1st *May*, 1871, under seal, entered into co-partnership, as clothiers and outfitters, for a term of five years, subject to a sooner termination thereof after one year, by a notice in writing at the expiration of three months from such notice or such further time as might be named in said notice, as if one of the parties was deceased, to be given by one partner to the other. Then followed a clause by which defendant was "authorized to terminate the same at the end of the first year without any notice, if the business should not prove satisfactory to him."

The merits of the controversy depended upon the true meaning and legal construction of this clause. Defendant having terminated the partnership, ejected plaintiff, which was the grievance for which he sought to recover damage.

The strength of the defence consisted in his 4th plea, which set out the clause in the co-partnership articles referred to, and under which he sought to justify the termination of the contract.

In his charge to the jury the learned Chief Justice expressed himself strongly as to the effect of this clause, saying "that plaintiff could not succeed," although he had declined to nonsuit on the application of defendant's counsel.

At the threshold of this inquiry lies this question, whose duty and province was it to expound this written instrument and declare what it meant, and especially that clause upon which defendant relied. It clearly appertained to the Court, and not to the jury. *Broom*, in his *Legal Maxims*, p. 81, sec. 107, says: "It is the duty of the Court to construe all written instruments as soon as the true meaning of the words in which they are couched and the surrounding circumstances have been ascertained as facts by the jury, and it is the duty of the jury to take the construction from the Court," &c., &c., adding, "If this were not so there would be no certainty in the laws," &c. *Ad questionem legis respondent judices, ad questionem facti juratis.*

Entertaining this view, His Lordship added: "I instructed the jury that as the construction of the deed belonged to the Court, and my opinion of the above clause had not been shaken, the defendant was entitled to their verdict."

Defendant had reserved the right to himself of dissolving the contract—arbitrarily, if you choose—and plaintiff agreed to it when he signed the articles. Defendant did not stipulate for exercising such a right. If reasonable grounds such as a jury might approve should exist, he reserved it unconditionally, and he was not compellable to give any reason for what might be considered a capricious exercise of it.

Having pleaded the clause in bar, and given proof of his dissatisfaction with the partnership business and the mode of its being conducted and the results, we think with His Lordship who tried the cause that the verdict should have been for the defendant. This rule *nisi* must be made absolute with costs.

LYON v. MORTON.

WHERE the question at issue was purely one of fact, involving no legal points whatever, and the Judge left the whole charge open to the jury, who found for the plaintiff.

Held, That the verdict could not be disturbed.

McCULLY, J., now, (August 15th, 1874,) delivered the judgment of the Court, as follows:—

This was an action of ejectment tried at *Windsor*, wherein a verdict passed in favor of plaintiff and a rule *nisi* was taken under the statute.

It was urged for defendant that there had been misdirection by the learned Judge who tried the cause. But I have not been able to arrive at that conclusion. The dispute was largely, if not wholly, one of boundary, and the question was which of the two lines—that claimed by plaintiff or that by defendant—was the true division line. A mass of evidence as to acts of possession and admissions by the respective parties was presented to the jury, and withal so conflicting and so contradictory that the case was emphatically one for a jury. The learned Judge who tried the cause viewed it in that light, and in his report of the trial and a brief charge says: "I left the whole charge open to the jury." In doing so I think he was right, and it was the province of the jury to find for plaintiff or defendant, just as they gave credence to the testimony on one side in preference to that produced on the other.

If it were open to the Court to pronounce as to the weight of testimony, which is rarely if ever the case, it would be exceedingly difficult to say how the balance should be adjusted. But the jury, who constituted the proper tribunal, have settled that point by finding for plaintiff.

The technical objections taken on the part of defendant at the argument that the action was for a whole lot and the proof only for a part, if available for any purpose, should have been taken at the trial, when an amendment might perhaps have cured such a defect if it existed; but the jury have settled that as one of the questions of fact.

It was then contended that there was no evidence of plaintiff's possession of the north part of the lot, but the finding of the jury concludes defendant as to the entire lot described in the pleadings.

It was urged that there was a portion of plaintiff's documentary title outstanding in some of his relations, as shown by his own witnesses. The proper time for defendant to have availed himself of such an objection as that also was during the trial, when the record could have been adapted to the proofs if it were necessary. But the plaintiff claimed by possession for more than twenty years, as well as by documentary evidence and under the statute of limitation, as

applicable to a case like the present. Had the plaintiff entered upon his possession alone, and the jury found for him the Court would not disturb such a verdict.

The rule must be discharged with costs.

MORSE v. RIPLEY.

DEFENDANT gave plaintiff a warrant of Attorney to secure the price of a lot of land. Plaintiff entered up judgment, and issued execution which defendant sought to have set aside on the ground that there was an endorsement on the warrant giving him ten years time, which had not expired. Plaintiff admitted the endorsement, but claimed that it had, at the time of its execution, been erased with the consent of defendant. Defendant alleged that the erasure was accidental, and had occurred subsequently. The evidence corroborating plaintiff's position.

Held, That the judgment should remain, and execution issue.

McCULLY, J., now, (August 15th, 1874,) delivered the judgment of the Court, as follows:—

This case came from *Amherst* upon a motion to set aside a judgment entered up on a warrant of attorney, an execution issued, and a levy thereunder with costs, on grounds set forth in defendant's affidavit, the exhibits annexed, inspection of the warrant, and other papers on file. A rule *nisi* was granted there with a stay of proceedings, and the learned Judge who presided gave leave to move to make it absolute in Term.

The cause was argued and preliminary affidavits read in reply. A defeasance, it was contended on the part of defendant, had been written on the back of the warrant, giving him ten years to pay, &c., and on inspection of the paper it was found so besmeared and blotted with ink, that the writing endorsed was not legible.

On the part of plaintiff it was not denied that such a defeasance had been endorsed, but it was sworn that it was endorsed under a misapprehension or mistake, and that before or at the time of execution it was erased under an agreement with and by the consent of defendant. The blotting and besmearing were admitted, but sworn to be the result of an accident occurring at a subsequent date from the upsetting of an ink-bottle. The warrant of attorney had been taken to

secure the price of a lot of wilderness land which defendant had purchased of plaintiff and his brother, *Robie Morse*, to lumber on, and in the act of disposing of the lumber taken off the land and manufactured close by at a saw-mill, plaintiff levied upon it.

The merits of the controversy depended upon the contradictions and conflicting statements contained in the affidavits read. In addition to his own affidavit and that of his brother, *Robie Morse*, plaintiff produced affidavits of other parties giving color, to say the least of it, to facts not altogether immaterial, favorable to portions of his own, and corroborative of statements made by *Robie Morse*, who was interested in the judgment.

We think, on a careful consideration of the facts as testified to on both sides, that a case has not been made out to warrant the making the rule *nisi* absolute.

The rule *nisi* refers to the affidavit of defendant and the exhibit annexed, that was the note, the warrant of attorney, and other papers on file, but not to the execution, nor is any copy of it among the papers, nor have we any means of knowing what the order, if any, consisted of, requesting or directing a levy. The Court, however, are of opinion that the plaintiff under any circumstances is and ought to be limited in any levy and sale to the amount of one hundred dollars, as agreed upon and admitted to be the amount payable in *April* or *May*.

Before closing, however, the Court feel it due to say that on an inspection of the warrant subjected to chemical proof, it is clear to them that the endorsement sworn to by plaintiff and his brother had been made and existed before the blotting occurred, and if so, all motive for improperly tampering with the paper by blotting it ceases to exist; consequently there is no room for any reflection upon the character of the plaintiff in this matter. The rule *nisi* must be discharged with costs.

IN RE ESTATE OF CATHERINE BARRY.

THE Testatrix devised to her grand-children "all my money in the bank or funds," and there was a residuary devise to another party.

Held, That those words did not include a sum of money contained in a chest in testatrix's house.

McCULLY, J., now, (August 15th, 1874,) delivered the judgment of the Court, as follows:—

This was an appeal from a decree of the late Judge in Equity sustaining the decree or order of the Judge of Probate for the County of *Richmond*. The sole question before the Court arose out of the 10th clause of the Will of the testatrix, which was as follows:—After making disposition of a portion of her estate, she gave her grandchildren, *John, Mary and Elizabeth Flinn*, "all my money in the bank or funds," and there being a clause containing a residuary devise to another party, the controversy was whether a considerable sum of money contained in a chest in the testatrix's house, viz., \$893.84, passed to the grandchildren or not—under the devise, "all my money in the bank or funds." The testatrix at the time, had a considerable sum of money in the *Bank of British North America*, but it was contended that, notwithstanding the residuary clause, the words "all my money in the bank or funds" meant all money whatsoever of the testatrix wherever found, that in the chest included.

A very elaborate judgment of the late learned Judge in Equity, and a great mass of cases and principles collected from text books were presented and read to us on the argument, but the plain evident meaning of the testatrix, as it seemed to the Court, could be obtained from the language used, without any forced construction or change of phraseology. "All my money in the bank or funds," in the bank understood, is no constrained or unusual manner of rendering such a sentence, and thus rendered it completely satisfies every word of the sentence, and does no violence to any of the rules of law for construing the language of wills and testamentary devises. On the contrary it harmonizes in the principles well understood and applicable to this and like cases. See *Wig. on Wills*, pp. 104, 194, 195.

"That construction of a will is to be preferred which, consistently with the rules of law, gives effect to the greatest part of it." See 4 *N. & M.*, 894; 3 *A. & E.*, 341; 5 *B. & A.*, 621, Ex. Ch.

Again: "The intention of the testator is to be collected from the whole of the will, which collection must be founded on the writing itself." 3 *Bur.*, 1553.

In the sense in which the words "funds" is understood in *England*, if the testatrix had had money invested in the consolidated funds, doubtless the language would have sufficed to have given her interest therein. But we have no securities in this country known as the "funds," and if there were, as the money in dispute was in a chest in testatrix's house, it becomes a mere speculative inquiry to pursue an investigation of the meaning of that word, further than to ascertain satisfactorily whether money in a chest in testatrix's house can be held to be money in the bank or funds. That the intent of the testatrix was to give her money invested in bank stock or on deposit in the bank there is little room for doubt, I apprehend, and in *F. d. Loundes v. Loundes*, 4 *Bur.*, 2246, the rule is laid down and is law to this day that a will must be construed according to the testator's intent, if the words will bear such a construction. That testatrix could have meant money in a chest in her house, in using the words "money in the bank or funds," is not to be supposed. In 2 *Mer.*, 22, it is laid down that in construing a will it is to be presumed that the testator was acquainted with the rules of law, and in 2 *Bur.*, 767, *Strong v. Cumming*, it is established that no particular form of words is necessary to convey the testator's meaning. The bequest here has been significantly and intentionally limited, as is clearly manifest. Had the language of the devise been, "all my money," doubtless money, whether in the bank, or funds, or chest, or elsewhere, would have passed. But purposely to prevent such an operation the testatrix limits the generality of the bequest by adding after the expression, "all my money" these words of limitations, "in the bank or funds." So that whether the clause be read literally, or whether to exclude the construction, that money in the bank, being not testatrix's money, but the bank money, the words, "or funds" were superadded, so as to

ensure the interest passing of all testatrix's devisable property in the bank, in either case this Court are of opinion that the words, "money in the bank or funds," where there is a residuary devise, did not carry money in a chest in testatrix's house. This view is strengthened by the decision in *Dutton v. Hackenhull*, Weekly Rep., vol. XXII., p. 701, a recent case, reported 20th June, 1874. There the testator, after bequeathing a legacy of £1,060 to his wife, gave her his writing desk and all the small coins, curiosities *and other articles therein contained*. At the time of his death the desk contained besides the curiosities, a sum of gold, several bank notes, and silver and copper, amounting in all to £321: Held by *Malins, V. C.*, that the above gift did not include the £321.

We think the decision of the Judge in Equity as well as that of the Judge of Probate. which it upholds, should be reversed.

PAYZANT v. MONTGOMERY.

PLAINTIFF, who resided in Kentville, brought an action against defendant and laid the *venue* at Kentville. The contract was made in Halifax, where defendant had resided, and all his witnesses were, and it was as convenient for the majority of plaintiff's witnesses to attend at Halifax for the trial as at Kentville, on application by defendant.

Held, That the *venue* should be changed to Halifax.

RITCHIE, J., now, (August 15th, 1874,) delivered the judgment of the Court, as follows :—

The defendant in this case made an application to change the *venue* from *Kentville*, in *Kings County*, to *Halifax*, and in his affidavit he states that the contract was made in *Halifax*, and that he and his witnesses, nine in number, reside in *Halifax*, and that if the cause is tried at *Kentville* instead of *Halifax* he will be put to an additional expense of at least \$400, and he further states that the plaintiff had threatened before the bringing of the suit that in case he would not pay his claim, and as a means of coercing him to do so, he would have his writ returnable at the Court at *Kentville*, and thus give him the trouble of attending there with his witnesses to defend the suit.

In answer to this application of the defendant the plaintiff says that he will require the attendance of twenty-eight witnesses to support his case, and, if all these or the larger portion of them resided in *Kings County*, there would have been reason for his having selected that county rather than *Halifax* as the most convenient for the trial, but of these witnesses four only reside in *Kings County*, and twenty-one at *Bridgewater*, in the County of *Lunenburg*, who can as conveniently attend at *Halifax* as *Kentville*, or nearly so, and if the plaintiff had considered the question of expense we would have thought he would have selected *Lunenburg* and not *Kings* as the *venue* of his action, and if he had done so it might reasonably have been contended, in case an application were made to change it, that it could be more conveniently tried there; but what grounds are there for denying that there is a preponderance of convenience in trying the case at *Kentville*, or *Halifax*, where the contract was made, and where the defendant and all his witnesses, nine in number, reside. Between those two places, in my opinion, the preponderance of convenience is in favor of *Halifax*, and the case of *Levy v. Rice*, L. R., 5 C. P. 119, supports the view I have taken of this case. That was an action for the breach of a contract at *Liverpool*, where the plaintiff resided and the contract was to be performed, and the *venue* was laid in *London*. The Judge at Chambers, on the application of the defendant, ordered the *venue* to be changed to *Liverpool*, upon an affidavit that all his witnesses, thirteen in number, resided there, notwithstanding that the plaintiff's affidavit stated that all but one of his witnesses, twenty-eight in number, resided in *London*, and the Court sustained his decision. *Montagu Smith, J.*, in giving judgment: "I do not understand the Judge to have said that if all the plaintiff's witnesses resided in *London*, and none or but a few of the defendants in *Liverpool*, he would have ordered the *venue* to have been changed to *Liverpool*, merely because the contract was made there; but the fact of the contract having been made in *Liverpool*, added to the fact of all the defendant's witnesses being *Liverpool* men, might well induce him to change the *venue* to that place. The discretion probably would not have been so exercised a few years ago, but the rule now is that if

there is a preponderance of convenience in trying the cause in one place rather than in another the *venue* will be changed." And at the close of his argument he says: "Probably the best rule is that where the preponderance of convenience and the place of contract and the defendant's residence concur, these should regulate the Judge's discretion in ordering a change of *venue*."

I cannot help adverting to the unsatisfactory way in which the plaintiff, *Tupper*, answers the statement of the defendant regarding his threat of putting him to the inconvenience of going to *Kentville* to defend the action, and the selecting of that place, while the defendant's witnesses and by far the greater number of his own resided in other counties, would seem very like the carrying out of such a threat.

After reading the pleadings in this case and considering carefully the affidavits on both sides, I am led to the conclusion that the *venue* should be changed to *Halifax*.

MCPHEE v. CAMERON.

In an action of ejectment the jury found for the defendant, and the Judge refusing a new trial, it was taken out under the statute. On argument the weight of evidence being clearly with the defendant,

Held, That the verdict could not be disturbed.

YOUNG, C. J., now, (August 15th, 1874,) delivered the judgment of the Court, as follows:—

This is an ejectment brought for a small triangular piece of land at *Lochaber Lake*, in the County of *Antigonish*, used by the defendant as a yard for his firewood, involving also a portion of his dwelling house. The case was tried in *October*, 1873, before Judge *Ritchie*, who left it to the jury on the conflicting evidence of a possessory title in the defendant. They found a verdict for him, and the Judge having refused a rule for a new trial, the case was argued before us under the statute. The legal title was originally in the plaintiff under a deed from his father, the grantor, and the plaintiff having conveyed the adjoining lot, bounded by an old road, to *John Fergusson*, in 1837, and the piece in dispute lying between

the old road and a new one laid out in the same year, the question turned mainly upon the possession of *Fergusson*, under whom the defendant held by deeds created in 1866 and 1868. These deeds bounded the defendant by the new road to the west, and covered the piece in controversy, and the defendant alleged that before he went to the place in 1867 the plaintiff told him he had nothing to do with this piece, and that he had sold it to *Fergusson* for a sett of harrow teeth. This, although contradicted, had doubtless some weight with the jury. *Fergusson* himself testified that he gave the harrow teeth in 1844, and that he was in possession of it by himself and his son till he gave the deed to *Cameron* in 1866; that neither the plaintiff nor any other person had ever been in possession since he purchased but himself and those he had put in; that he had cut down the trees on the triangle in dispute, had cleared the whole of it and had a crop, and had a temporary fence along the bank. He lived on the lot, he said, till 1854 or 1855, when he moved to the back lands, and then his son lived on it. He added that he had not for 30 years himself occupied it—not since he went to the back lands.

This inconsistency appears on the minutes, and was not inquired into or explained at the trial, but all the circumstances are in support of a continuous holding, and they were left to the jury. Some suspicion was cast upon the *bona fides* of the plaintiff's claim by the fact that upwards of 30 years after the new road was laid out and the old one abandoned he applied to the Sessions for an order to close it up, vesting the old road in himself two years before action brought. He gave notice of this application to *Cameron*, but without intimating his ulterior purpose in making or strengthening his title to the disputed piece.

The weight of evidence on the point of possession as against the title of the plaintiff is with the defendant, and the jury having found for him, I think the verdict ought not to be disturbed.

PUNCH v. CHISHOLM.

THE plaintiff entered into a parol agreement with defendant, whereby in consideration of his maintenance, which was to be secured by defendant's bond with two sureties, he undertook to give defendant a deed of his farm. Neither the bond nor deed were given, but plaintiff lived with defendant, and was maintained by him for several years. Then trouble arose between them, and plaintiff went away and brought an action to recover the farm. Defendant pleaded an equitable defence.

Held, That under chapter 89, Revised Statutes, section 6, the Supreme Court had full power to determine the equities between the parties, and that upon the defendant paying the costs of the suit, and giving the required bond, the plaintiff should execute a deed to him of the farm.

YOUNG, C. J., now, (September 1st, 1874,) delivered the judgment of the Court, as follows:—

The plaintiff in this case, a widower without children, infirm, and upwards of 80 years of age, is the legal owner of a farm of 150 acres at *Manchester Road*, in the County of *Antigonish*, which he acquired through his wife and has held as his own since the year 1820. His wife and he adopted a girl in her infancy, who stayed with them off and on till the death of the wife, and then remained with the plaintiff as his housekeeper, and married the defendant. A parol agreement was then entered into between the plaintiff and defendant, under which the defendant lived upon and cultivated the farm, erected a barn on it, and was to have it as his own upon the terms I shall presently inquire into. After some years, during which the parties lived together in harmony, the old man paid a visit to *Halifax*, and executed a deed of the farm to a nephew of his while there. Saying nothing of this, he returned to the defendant; but becoming dissatisfied, left him about three years ago, and in *April*, 1871, having got a deed of the land back from his nephew to perfect his title, he brought an action of ejectment. In answer to which the defendant, besides the usual statutable plea, gave notice of an equitable defence founded on the agreement under chapter 124, *Revised Statutes*, (3rd Series,) section 46, reproduced in the 4th Series as section 29 of chapter 94.

On these pleadings the cause was tried before Mr. Justice *Ritchie*, when the whole case was gone into. In an examination of the plaintiff, taken *de bene esse* and put in by the defendant, he said: "The conditions agreed on between me and the defendant were that he was to provide for me all the

necessaries of life, according to my station ; to find bed and bedding for me ; and to find a horse, waggon and harness for me any day that I wanted to leave home." In his direct examination at the trial he denied that there was any understanding or agreement between him and the defendant about giving him a title to the land, but this we must attribute to his infirmity or his age, for on being re-called he acknowledged that there was an agreement that the defendant was to support him and to receive a deed on giving a bond, with sureties whom he named ; that he got both deed and bond written according to the agreement, and that if the bond had been signed all would have been right. He declared also to *John McDonald* that he had given over his property to the defendant for his maintenance, and the terms, as he claimed them, appear in the draft of the bond which was in evidence. The defendant's account of it was, " that he, the plaintiff was to give me a deed of his farm, and I was to give him a bond with two sureties, two *McDonald's*, *John* and *William*, my brothers-in-law. They both agreed to do so, but *John* afterwards refused, and the bond was not executed." The defendant also testified that he had bought the plaintiff's stock from him and paid him cash for the whole ; that he had improved the farm to the value of £100, including the barn, in which he is confirmed by *Alexander Chisholm* ; that he had lived on the place nine years, and that the old man had been well used, and never complained until he left. The wife of the defendant and four other witnesses were also examined on this point, and there seems no reason to doubt that, notwithstanding some trivial complaints, the old man was kindly treated, and that the wife had a real regard to his wishes and comfort.

The Judge in his charge leaned strongly on the equities for the defendant, but the jury found a verdict for the plaintiff, induced probably by the fact that from the want of a bond the plaintiff had no security for his maintenance, and that he had given no deed. But it is very apparent that there are equities both ways, and the question is whether, under our system, we can give them effect. The plaintiff's counsel insisted at the argument that we must look at the legal title only, and turn the defendant off under an execution.

But I think that there having been an equitable notice, raising what is equivalent to equitable issues, the verdict, while it affirms the legal title of the plaintiff, and the necessity of protecting him, leaves us at perfect liberty, or rather obliges us to deal with the case on equitable principles, just as if the action had been brought by another party on the equity side of this Court.

This maxim, lying at the very foundation of our jurisprudence and involving the most important consequences, we asserted and acted on in *Michaelmas Term*, 1873, in the case of *The Bank of Nova Scotia v. Forman, Keith et al.*, ante p. 141, where the verdict, in the opinion of the presiding Judge, ought to have been for *Mr. Keith*, but a general verdict having been found for the plaintiffs, we treated it as having ascertained and settled the facts of the case, and administering equity law, we held that *Mr. Keith* must pay what by his promissory note he had admitted to be due. This we did mainly on the strength of the Acts of 1866, chapter 11, section 10, now incorporated with the *Revised Statutes*, (4th Series,) chapter 89, section 6, and as the case in hand furnishes a new illustration of it, it will not be amiss to reconsider the grounds on which it rests.

Let us dwell for a moment on the significant terms of the above section 6, chapter 89, to be found only in our own legislation. It calls again into being the unrestricted equitable power held by the Supreme Court and the Judges thereof between the years 1855 and 1864, when the act for appointing a Judge in Equity was passed. "All actions at law," is its language, "in the Supreme Court, on the trial or argument of which matters of equitable jurisdiction arise," and "all actions at law to which equitable defences shall be set up in virtue of chapter 94, section 162 to 164, and from section 296 to 300." In all such actions the Supreme Court shall have power to investigate and determine both the matters of law and equity, or either, as may be necessary for the complete adjudication and decision of the whole matter,—a comprehensive, and as I think a most wholesome provision, extending to every common law case, where equity principles are duly invoked by plea or replication, and legitimately apply.

If this be a correct view of the power and obligations of this Court, there can be no question that they extend to the case in hand, and our only inquiry will be, on the facts now before us, what was the equitable relations of the parties to and against each other, and how are they to be enforced?

This object of the defendant is to obtain a title to the land from the plaintiff, on certain conditions, and the cases cited at the argument, and to be found in the text books, *Sugden's Vendors and Purchasers*, 151, and *Fry on Specific Performance*, 174-181, abundantly shew that the *Statute of Frauds* is no obstacle in the way. In equity a parol agreement partly executed will suffice as an answer to the statute, of which an actual possession delivered to the purchaser, and the expenditure of money by him with the knowledge or assent of the vendor, in building or other improvements, according to the agreement, are accepted as proofs. The four essentials enumerated by *Fry*, section 484, to withdraw an agreement from the operation of the statute are all to be found here, and none of the circumstances in proof bring the case within the exceptions in the books. It was said in *Morphell v. Jones*, 1 Swanston, 181, that the acknowledged possession of a stranger in the land of another (taken, as in this case, with the acquiescence of the owner,) is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms; the Court regarding what has been done as a consequence of contract and tenure. In that case the Master of the Rolls desired the specific performance of a parol agreement to grant a lease, on the testimony of one witness, confirmed by circumstances, against the denial in the answer, after part performance by delivery of possession.

In the case in hand the contract was not only evidenced by the defendant's possession, but by his maintaining the plaintiff for some years at a cost at least twice the value of the rental. What the defendant failed in was his not obtaining the execution of the bond, by the sureties named or by any other responsible parties in their stead. Was this fatal to him, or can it be still supplied? It is essential that a bond shall be given or other adequate security acceptable

to the plaintiff, but not, as I think, that it shall be given by the parties named. *Fry*, sections 219, 616, 527. It must not be understood that the incapacity of the defendant to perform a contract literally and exactly in all its parts will be a bar to its performance.

From the distinction acknowledged in courts of equity between the essential and the non-essential terms of a contract, it follows that where a contract cannot be performed literally, it may yet be performed *cypres*, and all the cases in which compensation is made by the defendant are illustrations of this distinction.

On these grounds I am of opinion that the parol agreement between the parties under all the circumstances in proof is binding in equity, and ought to be carried out; that the defendant, within a reasonable time to be named in the order, shall find two responsible sureties who will join him in a bond to fulfil its conditions; that as he failed to procure it before action brought, he should pay the costs of suit, including the costs of argument, with the sum of \$120 towards his cost of maintenance to the present time, and that the plaintiff should thereupon convey to him the farm. The form of the bond and deed to be settled by a Judge if the parties differ.

I would suggest to them, however, that a clause in the deed, making the conditions a charge upon the land, with a covenant for their performance, would be a better security to the plaintiff than any bond, and would relieve the defendant from the necessity of looking for sureties. And in view of the ill-feeling that has been engendered, a reasonable money payment might be substituted by consent for the conditions of the agreement. Should the defendant fail in complying with this decree, the plaintiff to have judgment on his verdict with cost of suit and of argument.

DECISIONS
OF THE
SUPREME COURT OF NOVA SCOTIA,
DECEMBER TERM, 1874.

DAVISON v. BENJAMIN.

SEVERAL crown grants from which plaintiff deduced his title purported to convey a specified number of acres, described as contained within lines commencing at a fixed point, and running specified distances to other points indicated by marked trees and other monuments, which appeared upon plans annexed to and referred to in the body of the grants.

Held, That the monuments, being ascertained, must control the quantities purported to be granted, and the distances mentioned in the grants, notwithstanding the fact that the number of acres included in that case would be enormously in excess of the number which the grants purported to give. The least objectionable of all difficulties is to make quantities, whether too great or too small, yield to actual monuments on the ground.

Per SIR W. YOUNG, C. J.—The grants might have been attacked by the crown for excess but, in the absence of such proceedings, the land included could not be re-granted to a stranger. Under the usage of the Court, parol evidence is admissible to shew the actual position and surveys of lauds included in grants of wilderness and wood lands.

MCCULLY, J., now, (December 8th, 1874,) delivered the judgment of the Court, as follows :—

This was an action of replevin tried at *Kentville*, in the autumn of 1873, before me, in which a verdict passed for the plaintiff. Denuded of all irrelevancies, the real question for the consideration of the Court in this case is whether plaintiff is entitled to maintain the verdict in his favour on a title deduced by mesne conveyances from a grant or grants of the crown given in evidence.

Plaintiff's principal witness was *E. D. Armstrong*, the Deputy Crown Surveyor, who not only surveyed or laid off

the several grants under which plaintiff claims, but also what is known as the *Gates* grant, an older and more southwardly grant, and upon which plaintiff's lands are bounded on the south. That two of the crown grants under which plaintiff claims were originally laid off by *Armstrong* for himself, the more northwardly one to *C. M. Black*, and that they all four contain, according to the metes and bounds as claimed by plaintiff and those from whom he derived title, very much larger areas in acres than the crown grants professed to give there is no doubt whatever. The *Gates* grant was dated 3rd *July*, 1857, and purports to contain 1,100 acres. The grant to *Black* is dated 16th *June*, 1864. It purports to contain 400 acres, but being 120 chains long by 56 wide, the area is undoubtedly 672 acres. By the line claimed it has 795. *Armstrong's* grant, No. 1, is dated 23rd *August*, 1864. It purports to contain 100 acres, but actually by metes obtained by plaintiff contains 772. No. 2, same date, instead of 100 acres, contains 760 by metes and bounds. No. 3, dated 19th *October*, 1865, instead of 100, contains 400 acres, as plaintiff claims, by metes and bounds. These were objections urged against plaintiff's title. Plaintiff's south grant, bounded on the north line of *Gates'* grant in the description, starts at the south-western corner on the *Cushing* line, so-called, and runs east 120 chains, and it was contended that this limited plaintiff and those under whom he claimed to the net distance described in the crown grant, and so left all the lands east of 120 chains ungranted and in the crown.

It appeared on the trial, and the evidence is not controverted, that the starting point of the *Gates* grant and the termination of its survey was a pine tree. But in running out the northern line of the *Gates* grant, at the eastern corner there was a hemlock tree standing on the bank of a river, which becomes the north-east corner of the *Gates* grant, and a material and important landmark, in connection with the case in view, of the grants and plans annexed. The survey for the south *Armstrong* grant was from this hemlock,—of this there can be no doubt. The *Black* grant, next in point of time to the *Gates* grant, *Armstrong* says: "I ran out, starting at this hemlock tree, north-east corner of the *Gates* grant. I ran north to a large birch tree, &c. We ran thence through

the *Tomahawk Lake* to the *Cushing* line." As the *Cushing* line had been run before the outlines of this grant were thus completed, plaintiff's title embraced what afterwards constituted, according to *Armstrong*, four grants, with *Gates* on the south and *Cushing* on the west. He then described his survey of the south *Armstrong* grant: "My first course and distance," he says, "was north from the hemlock, that is, the north-east corner of the *Gates* grant, the necessary distance to a spruce. I started this line on, that is, from the spruce westwardly, but did not run across to the *Cushing* line." He adds below: "The east line of the 1st *Armstrong* grant ran through the *North Twin Lake*. The line from the hemlock to the north through the lake to the beech is a well-defined line to this day that pointed out the *North Twin Lake* on the plan attached to the grant." To run out the 2nd *Armstrong* grant, witness says: "I ran on from the north-east corner of the first *Armstrong* grant east to a spruce. Started the side line of the same as I did for the other. Did not run out the third grant. It lies between the 2nd and *Black's* grant." No part of this testimony is questioned or contradicted. It stands there unqualified. But this is not all. *Laird* materially confirms *Armstrong*, if his uncontradicted statement needed confirmation, for he says: "The east line of the *Armstrong* and *Black* grants is a well marked surveyor's line." And *Laird* is also a government surveyor.

That the survey on the ground of the 1st and 2nd *Armstrong* grant, as well as the *Black* grant, was made as described by *Armstrong* there can be no room for doubt. That the hemlock tree, the *North Twin Lake* and the *Tomahawk* stream and lake are monuments of that survey according to these two witnesses is beyond question. As regards the description contained in the crown grant, *Armstrong* says: "Sometimes when I make a survey I start from a particular place and run, and when I make out the plan and description it starts from a different place, but this does not alter the survey." *Laird* says: "I generally take some easily described point, well known, and make the description from that, but do not begin necessarily where I began the survey." *Hendry*, one of defendant's witnesses, says: "I have no doubt the survey spoken of by *Armstrong*

and *Buchanan* was the one upon which the *Gates* grant passed." And referring to the course of procedure in the crown land office, where he has long attended, and being a land surveyor of upwards of 30 years, says he never issued a grant without a preliminary survey. There were minor points, such as the kind of trees marked and described as corner trees, the side of the river, where was the hemlock tree. *Laird*, hesitatingly, as it were, fixing one on the west side, saying: "Don't think I found a hemlock on the east side of the river. Found a hemlock on the west side." And what is called a river he describes as a small stream a man might step over. *Mr. Hendry* described a line he had found in the locality as a zigzag line, but what line there was does not appear. No person pointed it out for any purpose, and he was an entire stranger. It was of a line in about the same place *Laird* had said: "I think the north line of the *Gates* grant was made contemporaneously with the other lines of the grant." But in my view of the case this and much more of a like nature did not materially affect this controversy.

The defence was a grant from the crown to *John B. Campbell* of 500 acres, dated 15th *July*, 1868, which is not proved to have covered any portion of what plaintiff claimed as the *Armstrong* grants.

If the hemlock tree line prevailed as the eastern boundary of the *Black* and *Armstrong* grants, there was no land in the crown in that locality to be granted. But supposing the grant to *Armstrong* and *Black* not to operate, still a survey unquestionably was made, and, as *Hendry* says, a grant never passes without a preliminary survey, and this survey of *Armstrong's* was the only preliminary survey. Could the crown afterwards, and after transfers by the grantee to third parties, grant without office first found. And surely office found in a case like this would have given plaintiffs an opportunity of explaining that if a mistake existed as regards the lands or the quantities, it was not their mistake, and the crown in such a case, one might reasonably expect, would so far respect an innocent purchaser as to allow him to make good the loss, if any, to the crown domain by payments equivalent to the excess of lands. But to ignore the acts of their own officer, who unquestionably laid off these lots by a

line running from the hemlock up through the *North Twin Lake*, would scarcely comport with either law or justice. That the grant to *Black* has much to do with the merits is unquestionable, and it commences at a point due north 20 chains from the north-west angle of *Gates'* grant, and a little to the southward of *Tomahawk Lake*. This corresponds with the plan, and although the south *Armstrong* grant gives the description as from the *Cushing* line and running 120 chains east, still the grant refers to the plan attached, which has upon its face the monuments of title, the lake and run, &c., and the whole must be read in harmony, if possible, and perhaps the least objectionable of all difficulties in the great majority of like cases is to make quantities, whether too great or too small, yield to actual monuments on the ground. A few acres too many, it would scarcely be pretended, would vitiate a grant in a case like this. But unfortunately there is no known percentage of excess or diminution that applies. There is no rule this Court can call into operation which would solve the difficulty.

A good deal was said about lakes, swamps and waste lands, and it was pretty clear *Mr. Armstrong* thought he had a large discretion as a surveyor. Whether he had or had not might legitimately, perhaps, be inquired into before another tribunal, or in a proceeding at the suit of the crown, but it has little to do, I apprehend, with our present inquiry. I do not think, after what transpired in reference to the survey and the grant that followed, that the crown was in a condition to grant to *Campbell* any land claimed by plaintiff under their deed, had it done so till a full and fair inquiry had been instituted in the usual way.

In *Smith's Leading Cases*, Edition of 1873, the learned Editors, in the notes p. 164, vol. 2, remark as follows: "Measurements are of small importance. Where monuments are called, for monuments control measurements. This has for a long time been held a sound recognition of principles in this Court, wherever and whenever it applies." Now in each of the crown grants, is contained this language: "Which said lot is particularly marked and described in the annexed plan, as also in a plan of survey of the lot made by *Ed. E. Armstrong*, Deputy Surveyor." Annexed to these were plans, and annexed

to the 1st *Armstrong* grant, bounded southwardly on the *Gates* grant was a plan shewing the *North Twin Lake*, and the outlet or brook, with its easterly line or boundary running through it precisely as on the ground. If *Armstrong* and *Laird's* uncontradicted testimony is to be believed, and the survey made by *Armstrong*, the Deputy, referred to in the grant, that survey, if it can be ascertained satisfactorily, must of necessity be the governing principle in order to ascertain what lands passed by the grant. The plan itself is incorporated in the description in the grant, and there plainly and clearly visible is the lake and line of the lands constituting the eastern boundary of the whole four blocks granted. With the evidence given on the trial can there be any doubt that the eastern boundary of *Laird*, surveyed off by the Crown Deputy Surveyor, was the line from the hemlock tree through the *North Twin Lake*? Without this line there was and is no eastern line to the grants. For *Kerr's* line was not run till years after, and preliminary to *Campbell's* grant. This therefore adds great weight and importance to the plan annexed to the grant and referred to, and the survey. Had the description in the grant been written out, on its face that is the hemlock tree line, the *North Twin Lake*, the *Gates* grant line, &c., it would not have added to the efficacy of the description as it is, nor varied the principles of construction. For the words: "but is particularly marked and described in the annexed plan," &c., complete a reference to the plan, and according to that plan the east line of the lot runs through the *North Twin Lake*, starting from the north-east angle of the *Gates* grant. Had the description been written out in full, and referred to the line as running from the north-east angle of the *Gates* grant east through the *North Twin Lake*, probably it would not be contended on the face of the survey proven that either the distance from *Cushing's* line or the quantity could control such a monument as the lake, and yet if the plan has any applicability at all it supplies these facts as conclusively, as already remarked, as if written out there in full, and according to the authorities I shall presently cite, as I take it, settles this question, at least so far as to negative the power of the crown to grant a lot west of that hemlock tree line without office first found.

The principles adopted by the courts as to the reception of maps and plans, when not referred to in deeds or grants, are to be found in *Taylor on Evidence*, section 557. "And even in such case, when made or recognized by persons having adequate knowledge, they would seem," says that able text writer, "to be valid evidence of reputation." Citing *R. & Milton*, 1 C. & R., 58. What then must be their effect when specifically referred to as part of the deed itself which conveys the locus.

Washburne says, p. 347 of his work on real property: "The quantity of land conveyed is mentioned in the deed, sometimes, but independently of an express averment, a covenant as to quantity this is always regarded as a part of the description merely, and will be regarded if it be consistent with the actual area of the premises, if the same is indicated and ascertained by known monuments and boundaries." It aids but ordinarily does not control the description of the granted premises. Again he says: "But ordinarily surveys are so loosely made, instruments so liable to be out of order, and admeasurements, especially in rough and uneven lands or forests so liable to be inaccurate that the course and distances given in a deed, are regarded as more or less uncertain, and always give place in cases of doubt or discrepancy to known monuments and boundaries that are referred to in the deed, and identify the land." He adds: "What constitutes a boundary in a deed is a fact for the jury, and may be proved by any kind of evidence which is competent to prove any fact. Where the jury were entitled for themselves to look at the plan attached to the grant they did so." They saw the monuments it contained, and upon the evidence given, which as to the survey and the eastern line of the lot was uncontradicted, as already remarked, they found a verdict for plaintiff. How they could have found otherwise if allowed to consider that plan and grant I cannot well understand.

rule nisi must be discharged with costs.

W. YOUNG, C. J.—This is an action of replevin in April, 1873, for 2,585 pine and spruce logs, cut by defendants in the previous winter between the North Lake and Tomahawk stream, in Kings County, and

seized by the plaintiffs as having been cut on their land. If so, the case of *Freeman v. Harrington*, and other decisions in this Court, independently of the recent statute, show that replevin will lie. The main question, therefore, if not the sole one, is the title to the lands.

Both parties rest on grants from the crown, six in all, issued between the years 1857 and 1868; five held by the plaintiff and one by the defendant, under conveyances from the grantees. The first of these grants was to the *Gates's*, which comes into question only as to its north line and a hemlock as its north-east corner. This point is of so much consequence in the inquiry that I must shortly review the evidence establishing it. The hemlock was said by some of the witnesses to have been west, and by others on the east bank, but is conclusively settled by *Laird's* recent survey to be on the east. *Mack* says: "There is a broad arrow or crow's foot on the hemlock tree. It is marked as a surveyor's corner." *Laird* says: "I ran easterly to a hemlock tree standing on the west bank of the outlet of the *North Twin Lake*. The hemlock is marked 'E. E. A.' and 'James Gates' in writing. The *North Twin Lake* is seven chains north of the hemlock." *Brown* says: "I know the north-east corner of the *Gates* grant—a hemlock. I saw it marked." And *Hendry* says: "I have no doubt the survey spoken of by *Armstrong* and *Brennan* (when the hemlock was marked) was the one upon which the *Gates* grant passed. I saw no other line on the ground that could be the north line." The two last witnesses were the defendant's, and although the measurements on the ground by no means correspond with the grant, there can be no doubt that the line terminating at the hemlock is the north line of the *Gates* grant and the hemlock the north-east corner.

The next grant was to *Black*, 20th September, 1864, of 400 acres, beginning at the distance of twenty chains, more or less, in a course north from the north-western angle of *Gates's* grant; thence running east 120 chains to a hemlock tree; thence north 56 chains to a large beech tree; thence west 120 chains; thence south by the eastern line of *Cushing's* land (which is a fixed and settled line) 56 chains to the place of beginning. This lot, as well as the *Gates*, was surveyed by

Armstrong, who was examined at the trial, and testified that in running it out he started at the hemlock, north-east corner of *Gates's* grant, and ran north to a large birch tree, (not a beech tree, as in the grant.) "I ran this," he says, "to connect the two surveys. From this I ran west through the *Tomahawk Lake* to the *Cushing* line, which had been then run." Now it is to be noted that the *Cushing* line on the west is the common base of the *Gates* and *Black*, and, as we shall presently see, of the three *Armstrong* grants, yet running east from that base to a common base. The length of the lines is set down in the *Gates* grant at 150 chains, and in the four other grants at 120, while the actual length of that line, which is not a straight line, but a zigzag and irregular line, appears by *Laird's* survey annexed to be 215 chains, that is, 127.50 and 87.50; yet four of the surveys on which these grants were passed were made by the same man.

I have spoken of the common base to the east being the line running north from the hemlock tree to the north-east corner of the *Black* grant, which is shown both by the *Black* grant and by *Laird's* survey to be a beech, for it is clear that there is no other base to these grants, that there is not a trace of any other upon the ground, and that no other, in fact, was ever run. It was first run, as we have seen, by *Armstrong* for *Black's* grant, dated in *September*, 1864, and on the 12th of *November*, in the same year, by a very questionable practice, he was permitted to take out his first and second grants, and on the 25th *December*, 1865, his third grant on the survey of *George Neily*, under his direction. These three grants profess to fill up the space of 20 chains between the *Gates* and *Black* grants, while on the face of them they extend to 35 chains from north to south. They profess to extend 120 chains in length, while in fact they extended, if to the common base, 215. They profess to convey 100 acres each, which is all the government was paid for, while *Laird's* evidence shows that they are enormously in excess of that quantity, as there can be no doubt that the *Gates* as well as the *Black* grants immensely exceed the quantities described in them. Are they frauds, therefore, or nullities, or can they be reduced—by what process and by whom—to their proper quantity of 1800 acres in all, in place of 3 or 4,000, or perhaps 5,000. These

are interesting and very important inquiries touching the effect and construction of grants of wilderness and wood land in this province.

It was repeatedly urged at the trial, indeed the whole minutes bristle with objections to parol evidence, which it was said should be excluded, shewing the actual position and surveys of the land in these grants. But it is clear that such evidence, conformably with our established usage, must be received.

On the first *Armstrong* grant there is a lake in the plan annexed to it on the eastern side, north of *Gates's* grant. Now the north-east angle of *Gates's* grant, the hemlock that figures so largely in this case, appears by the plan annexed to that grant to lie between two lakes called therein the *Twin Lakes*, evidently the north and south *Twin Lakes*. The plan on *Black's* grant shews the *North Twin Lake* to the south of it, and the *Armstrong* first grant is bounded on the plan by a common line with the eastern line of the *Black* grant. Now the lake on this last plan is not named, but can there be a doubt, with these grants before us, that it is the *North Twin Lake*, and if there be a doubt, cannot the evidence of surveyors and others conversant with the ground be admitted to clear it up? I think it impossible to reject such evidence, and the minutes are full of it. *Armstrong* says: The east line of the first *Armstrong* grant ran through the *North Twin Lake*. The line from the hemlock north through the lake to the beech (here he is right, it is a beech) is a well-defined line to this day. In order to run out the second *Armstrong* grant I ran on from the north-east corner of the first *Armstrong* grant east to a spruce. I started the side lines the same as I did for the others. *Neilly* made the third survey, and I got my third grant. I was the first person that ever ran lines there. I think it probable, when I ran up the line for the *Black* grant, I started lines for the *Armstrong* grant. I only started the ends of the lines at the east and west ends of the *Armstrong* grants—that is, he never ran them through, and the 120 chains, in these grants, is a mere guess work, but the side lines were actually run and clearly marked. This appears by the unsuspected testimony of *Laird*, from which I shall extract a few

sentences. He says: "The east line of the *Armstrong* and *Black* grants is a heavy well marked line—a surveyors line—assuming the south line of the *Armstrong* grant to be the north line of the *Gates* grant, then the lake on the plan is the *North Twin Lake*—the stream on the plan is the *Tomahawk* stream. By the plan to this grant (that is the first *Armstrong* grant) the land between the *North Twin Lake* and the *Tomahawk* stream—is in the *Armstrong* grant—being the spot where the cuttings were, as is shewn by *Laird's* plan." He then states the quantities in the *Black* and *Armstrong* grants, which he estimates as far as I can make it out, for there is some obscurity here, at 2,660 acres. How is this enormous excess to be accounted for? The breadth must have largely overrun as well as the length. Was this the result of gross carelessness, of mistake, or of fraud. I should have thought it fraud in *Armstrong*, but for the tone of his evidence and his declarations which betray no consciousness of fraud, and the fact that he sold the land to *Mack* for the same quantity he got, as appears by his deed, and received only a small profit of about £30. But although there may have been no fraud in intention, there was a fraud in point of facts practiced upon the crown to the injury of the revenue; and the question arises, in what way could it be remedied when discovered.

This is not the question properly before us, and I shall touch it but lightly. It would be strange if the crown were induced by the mistake or fraud of its officer, to grant to a stranger and a *fortiori* to that same officer, 500 acres of the royal domain, in place of a hundred acres petitioned and paid for, and that the law afforded no remedy. In a few excepted cases, *Revised Statutes*, chapter 11, section 8, the Governor-in-Council may declare a grant of the crown lands to be vacated, which has occasionally been done. Inquests of office for *escheat* under chapter 106, (which by the way have been recently abolished in *Ontario* as an ancient but needless ceremony) are of familiar use in this province. But neither of these remedies applying to the case in hand, the officers of the crown would be remitted to the common law as laid down in *Chitty* on the *Prerogative* 250, 330, 396, 400. "The King," says he, "is, generally speaking, bound by his grants; but this is

only, when they are not contrary to law either in themselves ; or void for uncertainty of description ; or unjust, as injurious to the rights and interests of third persons. In these cases, the King may, *jure regio* for the advancement of justice and right, repeal his own grant. As if the King grant, what by law, he is restrained from granting ; or the grant be obtained by fraud or a false suggestion, or be uncertain." For all which numerous authorities are cited, and the mode of proceeding pointed out by *scire facias* to repeal or avoid the grant.

I return, however, to the main inquiry, what are the true limits of the *Armstrong* grants, and how much land as between the parties to this suit shall they be taken to convey. And here the doctrine as to monuments, so much insisted on at the argument, and so often discussed in this court, comes into play. The numerous cases upon it are to be found in *Greenleaf on Evidence*, 12th Edition, note to section 301 ; in 4 *Greenleaf's Edition of Cruses Digest*, 338 ; and in *Hunt's Law of Boundaries*, 2nd Edition, chapter 14. All of these cite with approval four rules in the construction of grants, three of which bear upon this case. 1st. The highest regard is paid to natural boundaries. 2nd. To lines actually run and courses actually marked at the time of the grant. 4th. To courses and distances, giving preference to the one or the other, according to circumstances. In the case of *Davis v. Rainsford*, 17 Mass., 210, it is said : " Whenever in the description of lands conveyed by deed, known monuments are referred to as boundaries, they must govern, although neither courses, nor distances, nor the computed contents, correspond with such boundaries. This has long been regarded as one of the fundamental rules in the construction of deeds. It is not however, inflexible, but like other rules of law, must sometimes yield to exceptions." In *Makepeace v. Bancroft*, 12 Mass., 469, it was held that monuments mentioned in the deed, and not then existing, but which are forthwith erected by the parties, in order to conform to the deed, will be regarded as the monuments referred to, and will control the distances given in the deed.

In the light of these principles, let us again look at the descriptions in the *Armstrong* grants. The first begins at the north-eastern angle of *Gates* grant ; (being as that grant

shews, a spuce marked "*H. G.*") thence running east, by the north line of said grant, to a marked maple tree, which has disappeared; thence north to a marked spruce tree, which has also disappeared; thence west; thence south by *Cushing's* line to the place of beginning. It then declares in the usual printed form, that the lot is particularly marked and described in the plan annexed, which, as I have already said, ends it in a lake, and is intersected by a stream. The second *Armstrong* grant is bounded on the first; beginning at the north-western angle, and refers to a marked tree and stake, no longer found upon the ground. The third begins at the south-western angle of *Black's* grant; thence running east by the south line of said grant to a hemlock; thence south to a spruce, and thence by the north line of the second grant; thence north to the place of beginning. The plan on this last grant is intersected by the *Tomahawk* stream, which is represented also as intersecting the second, and extending south into what we know to be the first, but made further to the west than *Laird's* plan shows its real position to be.

The great importance, then of the plan on the first *Armstrong* grant, as containing the only natural monument on the east line, and the effect of the plan as incorporated with the grant, and the admissibility of evidence to fix the lake thereon, are very apparent.

On these points, I shall again cite *Davis v. Rainsford*, 17 Mass., 211, where *Wilde, J.*, says: "When lines are laid down on a map or plan, and are referred to in a deed, the courses, distances, and other particulars appearing on such plan, are to be as much regarded as the true description of the land, conveyed as they would be, if expressly recited in the deed. This is a familiar rule of construction in all those cases, wherein no other description is given in the title deeds, than the number of the lot in a surveyor's plan of a township, or other large track of land."

In *Magoun v. Lapham*, 21 Pick., 137, where reference was made to a plan in a deed, *Wilde, J.*, repeats the rule in nearly the same terms, and cites *Lunt v. Holland*, 14 Mass., 149, where the boundaries in the deed being definite and fixed by monuments, were extended, in virtue of a plan referred to therein, so as to include an island not mentioned in the public

grant. In the case of *Lyle v. Richards*, in the House of Lords, 15 L. T. R., N. S. 1., a sett or grant of a mine in 1835, executed by Lady Bassett, after describing the premises, added: "Which said premises are particularly delineated by the map on the back of this sett." The question was, from which corner of a house mentioned in the grant, one of the lines ran, and how far parol evidence was admissible, and whether it was a question for the judge, or the jury. I shall cite only a few lines from the judgments. The Lord Chancellor, said: "In considering this deed of 1835, this court was bound to look at the map as forming part of the deed." "The use of the map was to clear up, what without it was uncertain, namely, from what part of the house the line was to be drawn." Lord Chelmsford said: "There was nothing in the evidence to disturb the fact of the line being drawn from the north-east corner of the house, or to remove it from the face of the map, as part of the deed." And Lord Westbury, who differed from the other two on the main question, observed: "Before the Court *in hanco* the defendants insisted that parol evidence was not admissible to prove and correct the error in the map, or at all events, to alter or affect the position of the boundary line, which whatever might be the true site of the house, must as the defendants contend, be drawn from the north-east corner of it. It is admitted that the map must be treated as incorporated into, and forming part of the parcels in the sett or grant of 1835. In my opinion the evidence was clearly admissible. Upon a question of parcel or no parcel, parol evidence is always received."

On these and many other authorities, both English and American, I look upon the plan in question as forming a part of the grant, and I have already remarked on the admissibility of parol evidence to explain it, for which the cases are cited in *Mr. Huestis's Treatise*, 222-5. The legal inference, I think, that must be drawn, notwithstanding the enormous excess of quantity, which the crown might have attacked, and probably with success, by *scire facias*, but until then could not re-grant to a stranger, is that the whole block bounded north by *Black*, south by *Gates*, west by *Cushing*, and east by the hemlock line, passed under the *Armstrong*, grants, and from thence by mesne conveyances to the plaintiff.

The grant to *Campbell*, under which the defendant claims was treated on the trial as containing the spot where the cuttings are marked by *Laird*, but I have been unable to reconcile this with the grant itself and the plan annexed to it. This is of the less consequence, as the main question is the plaintiff's title. It is not affected by the fact of *Mack's* (who conveyed to them) having recovered in trespass against the defendants for cutting before their conveyance to the plaintiffs; and their right is certainly strengthened by the large expenditures, amounting to \$7,000 or \$8,000, in the erection of dams and clearing out the stream to make it navigable up to the *Tomahawk Lake*. Here was an actual possession into which the defendants intruded, and although I cannot but regret that so large a portion of the fruits of three winters' work passed out of their hands, still I am forced to the conclusion that on the principles frequently upheld in this Court, the plaintiffs had a right to replevy, and the rule for a new trial should be discharged.

COCHRAN v. BELL

WHERE a first execution is sued out within six years of judgment it is not necessary to issue the next execution within six years from the issuing of the one last previously issued.

The appointment of a special deputy or bailiff by a party to a suit discharges the Sheriff from all responsibility.

MCCULLY, J., now, (December 10th, 1874,) delivered the judgment of the Court, as follows:—

This was an action brought by plaintiff against the Sheriff of the County of *Halifax*, in which, among other things, he was charged with neglect in not executing a writ of execution issued out of the Supreme Court upon a judgment at suit of plaintiff against one *William Dorey*, which had been placed in his hands for that purpose. Plaintiff's execution was returned not satisfied, whereby plaintiff was delayed in recovering his debt, and is likely to lose the same. Defendant pleaded to the writ and afterwards by leave amended and added three new pleas, called "4, 5 and 6, new or amended pleas." Whereupon plaintiff obtained leave to reply and

demur to these pleas. The 4th plea sets forth that the execution issued upon a judgment void for not being renewed, and more than six years having elapsed since the issue of a previous execution. The 5th plea varies from the 4th by alleging that the execution issued upon a judgment recovered in 1854, never revived, and more than six years after the judgment was entered. The 6th plea is that the writ of execution was placed by defendant in plaintiff's hands, and by plaintiff's request and at his wish one S. S. was specially deputed by defendant, in an instrument under his hand and seal, to act for plaintiff in executing said writ. And so alleges that his liability for acts done or omitted by S. S. ceased. To these three pleas plaintiff demurred and pleaded.

It is with the demurrers, therefore, that this Court is now called upon to deal. And as to the defendant's 4th plea or 1st amended plea, I am of opinion that plaintiff is entitled to the judgment of the Court. It is true that plaintiff's execution issued on a void judgment, and that the demurrer admits this fact. If it were not plaintiff, instead of demurring, should have denied the allegation. But defendant proceeds and gives reasons why the judgment is void in the same sentence, and they do not establish his conclusion. On the contrary, and upon the facts set forth such a judgment is not necessarily void, because by section 188 of *Revised Statutes*, (1st Series,) chapter 94, a plaintiff has six years instead of the year and day at common law, in which he may issue execution upon a judgment recovered. Nor is a judgment void if more than six years were to elapse before execution sued out. Having sued out a first execution within six years of judgment, the law has not declared that it shall become necessary to issue the next execution within six years from the issuing of the one last previously issued. Had defendant finished his plea after the word "void," there must, upon such a demurrer, have been judgment for defendant. On the fifth plea or second amended plea for the reason just given, judgment must be for defendant. Because defendant having alleged, that although a judgment was recovered by plaintiff against *W. D.* so long ago as 1854, yet the said judgment has never been revived, and the execution in question issued hereupon more than six years after the judgment was entered. And this is

exactly what this 188th section of the chapter 91 does not authorize. It refers to the common law principle of issuing executions within a year and enlarges the time to six years. The plaintiff, by demurring, admits that more than six years from the entering judgment had elapsed before execution issued, and that the judgment had never been revived, consequently no execution could legally issue. As to the sixth plea, or third amended plea, which is also in bar to the plaintiff's writ, bearing in mind that the truth of the allegations it contains are all admitted, no principle is more clearly settled than that the appointment of a special deputy or bailiff by a plaintiff or defendant party to a suit discharges the sheriff from all responsibility. *Porter v. Viner*, 1 Chit., 613 n.; *Ford v. Leche*, 1 N. & P. 737, 6 A. & E., 699. It was contended on the argument that the confession contained in the plea was not large enough. The Court thought otherwise, and the course of modern pleading quite justifies the practice in this instance. If the plaintiff had had doubts or been embarrassed by the course adopted, he could easily have remedied any existing difficulty by applying to a Judge at Chambers. But the doctrine cited from *Stephens on Pleading*, 185, settles that. The old system of confessing, by "true it is" is now abandoned. Upon this plea and demurrer, judgment must be for the defendant; and as both these last pleas go to the root of the action, the last to the merits as well, the barren result of a lengthy argument is that plaintiff may tax costs on his demurrer to one plea, and defendant tax costs as to the two pleas upon which he prevails. I have not referred to the fact mentioned by his Lordship the Chief Justice that these issues in fact have all been tried by a jury, &c.

Verdict passed for defendant; nor do I now further go than to say, that in that case judgment herein finally settles the whole contention. The costs when taxed to be set off one against the other.

GEORGE BARNHILL ET AL v. JOHN PEPPARD.

THE occasional cutting of wood and poles in wilderness land is not such a possession as will enable a party to maintain trespass.

MCDONALD, J., now, (January 18th, 1875,) delivered judgment, as follows :—

This is an action of trespass to lands brought by *George Barnhill*, and two others, who sue as guardians of minors named in the declaration, claiming under *John Barnhill*, deceased.

The defendant, in addition to several pleas in denial, pleaded property in himself, and also tenancy in common with the plaintiffs. At the trial it was admitted that the defendant cut wood on the land in question, and it was agreed that nominal damages should be allowed if title were shown in the plaintiffs. No document was produced on either side showing legal title in either of the persons under whom the respective parties claim—that is to say, *Anthony McLean* on the one hand, and old *John Barnhill* on the other; but a certified copy of a plan was produced, which, if evidence of title, would show the land to have been originally that of *McLean*. A verdict was taken by consent in favor of the defendant, subject to the opinion of the Court.

It appears by the evidence that the lot is part of a large block of land which many years ago was known as the *McLean* block, and *James Crowe* and several other witnesses prove that the block was divided by lines actually run over fifty years ago, among a number of persons who were present at the time, and of whom the defendant's father was one, and *John Barnhill*, under whom the plaintiffs claim, was another. Lots were drawn by the different parties to the division, and the place in question fell to *Barnhill*. Some of the witnesses say that the parties occupied, according to the division, down to the time of action,—but *Crowe*, who claims one of the lots, upon his cross-examination says, that it is principally forest to the present day—that he never knew any occupation of the B. lot, but by cutting; and the witness *Desmond* says, that “they occupied when they wanted poles.” Taking the whole of the evidence, I do not think that any doubt can be enter-

tained that these qualified expressions of the witnesses correctly define the nature of the alleged occupation of the place by the plaintiff and those under whom he claims. I cannot concur in the view urged on behalf of the defendant, that under our statute the guardians of the minors cannot legally be plaintiffs in this action, and if there had been evidence of title in old *John Barnhill*, the case of the plaintiffs would, I think, have been complete.

The plaintiffs, to enable them to recover in this action, must show actual or constructive possession of the land, and I agree with the learned Judge who tried the cause, and who recommended a non-suit, that under the law by which we are bound they have entirely failed to establish such possession. There clearly was no actual possession and neither documentary title, nor title by adverse possession for the prescribed time was proved; nor was any other evidence given which would show any possession, the occasional act of cutting wood and poles in wilderness lands clearly not being such.

It was urged on behalf of the plaintiffs, that the defendant by offering to purchase the land, had admitted the plaintiffs title; but such admission amounting to an estoppel would not itself be a title, nor give a right of action in a case like this, although if uncontradicted and unexplained, it would be good evidence in support of a title otherwise shown, though disputed. But the defendant as positively denies that he made the admission as the plaintiff asserts it; and if the plaintiff's case was not strong when a non-suit was moved for, it certainly gained no strength from the evidence on behalf of the defendant. It will be remembered that the very first witness called on behalf of the plaintiff said, that the block of which the lot in question is a part, was the "*Anthony McLean grant so-called—a large block called originally the Anthony McLean block.*" The last will of *Anthony McLean* is produced, devising all his lands to *John Anthony Peppard*, under whom the defendant claims, and the evidence shows that *McLean's* right, whatever it was to the land, was transmitted to the defendant.

I do not mean to say that if the plaintiff had made out a case this would have been sufficient to defeat it; but I do think that, irrespective altogether of the plan which was

regarded by the defendant's counsel, as evidence of title, he the defendant approached nearer to make out a case than the plaintiff, if the reasoning and the law, urged by the learned counsel for the plaintiff were adopted, and applied to the evidence on both sides—and I think that the verdict must be upheld.

CURWIN v. THE WINDSOR AND ANNAPOLIS RAILWAY COMPANY.

PLAINTIFF, a passenger travelling by the Windsor & Annapolis Railway from Annapolis to Richmond, fell while alighting from the train at the latter place and sustained injuries, to recover damages for which he brought an action against the company, charging them with negligence in respect to the lighting of the station and the provision of safe means of transit of passengers from the cars to the platform. The evidence on these points being contradictory, and the jury having found for the defendant, the Court refused to disturb their verdict.

MCDONALD, J., now, (January 18th, 1875,) delivered the judgment of the Court, as follows:—

The plaintiff, who was a passenger on the Railway from *Annapolis* to *Richmond*, and paid his fare to the defendants, charges them in the first count of his declaration with so negligently and carelessly conducting themselves, that he was thrown, fell, and broke his leg, whilst alighting at *Richmond* station. The second count avers, that whilst he was such passenger, the defendants were possessed of the Railway stations at *Annapolis* and *Richmond*, and that they managed the same so negligently, and so carelessly omitted to light them, and to provide for the safe transit of passengers from the carriage to the platform, that the injury was occasioned.

The defendants, with several pleas in denial, pleaded that the injuries were occasioned by the negligence of the plaintiff, that they (the defendants) were not possessed of the *Richmond* station as alleged, but that the same was under the management of the agents of the Government of *Canada*, who were to light it.

The jury found for the defendants.

I fail to see, as was urged at the argument, that evidence for the defendants was improperly received under the pleadings, and there being no misdirection, I do not see that there

can be a new trial after the jury have passed upon evidence which made the case one peculiarly for them.

There can be no doubt that the defendants undertook, for reward, to convey the plaintiff over the road from *Annapolis* to *Richmond*. Neither is there any doubt that the plaintiff received the injury mentioned whilst attempting to pass from the carriage to the platform; and it was conceded at the argument that, by the undertaking, the defendants were bound to provide, in a reasonable manner, the means of safely alighting—among which means must be reckoned sufficient light for that purpose. The main questions at the argument, therefore, were whether or not the platform and light were sufficient, and whether the plaintiff himself, by his negligence, contributed to the injury. Evidence was given on his part that the platform was unfit for the purpose; but he and his witnesses were contradicted on that point, and the jury having found for the defendant, that question must be regarded as settled. Upon the question of the station having been improperly or insufficiently lighted, the plaintiff testified that the place was quite dark—so dark that he could not distinguish what he was stepping on. He is, to a certain extent, corroborated by two witnesses, but is contradicted by another, who swears positively the other way. I have not been able to find a case like this in the English books, though there are not a few in which damages were sought for injuries sustained in alighting, and in some of which the question of defective lights came up. In the case of *Cockle v. The London & S. E. Railway Co.*, L. R. 1 C. P., 321, it appeared that outside of the station the rails gradually receded from the platform, so that, opposite to the carriage occupied by the plaintiff, when the train stopped, there was a space of four feet between the carriage and the platform. The night was dark and that place not lighted, though the station was. There was no invitation to alight, though the train was brought to a stand-still—no warning of danger given, and the plaintiff, stepping out, fell into the space and was injured. The defendants were held responsible for negligence. That case, however, differs from this in the undeniable fact that the platform receded from the track and therefore was deceptive. So in the case of *Praeger v. The Bristol & Exeter Railway Co.*, cited by *Cockburn, C. J.*,

in his judgment in the last case, the carriage occupied by the plaintiff was drawn up opposite a part of the platform, which was curved so as to allow a space for a siding, which there joined that line of rails, leaving a distance of eighteen or twenty-four inches, into which the plaintiff fell while endeavoring to get on the platform at night, the place being but dimly lighted. Although in the Court below a majority held that there was no evidence of negligence, the Court of Exchequer Chamber unanimously were of opinion that there was evidence of negligence. In the other English cases that come nearest to this, the trains either did not come up to the station or had overshot it when passengers were invited to alight, or there were some other facts which materially distinguish them from this.

Although, no doubt, companies who undertake to convey passengers, for reward, from one station to another, are liable for the legitimate consequences of their failing to provide sufficient light to enable passengers to leave the train in safety; yet passengers by their own negligence may defeat their own remedy.

Saunders, in his work on *Negligence*, under the head, "Contributory Negligence," says, "Although the defendant may have been guilty of negligence, yet if the plaintiff has himself been guilty of such negligence that the accident would not otherwise have happened, he cannot recover damages, for he cannot complain of an injury which his own negligence has contributed to bring about." And he cites *Tuff v. Warman*, 2 C. B. N. S., 740. In *Bridge v. The Grand Junction Railway Co.*, 3, Mee. & W., 244, *Park, B.*, said,— "Although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care have avoided the consequences of the defendants negligence, he is entitled to recover; if, by ordinary care he might have avoided it, he is the author of his own wrong."

In *Peppy v. The Great Western Railway Co.*, L. R., 5, C. P., 461 n. When the train stopped at the station, at which the plaintiff wished to alight, the carriage occupied by him was beyond the platform, and opposite a white path which in the dark looked like a continuation of the platform. In the dark the plaintiff got out on the path, was hurt, and the jury gave

him a verdict. On argument of a rule *nisi* for a new trial, *Ramwell*, B. thought the jury should have been asked whether the plaintiff really thought that the white path was the platform, considering that otherwise he ought to have seen the danger, *and if it was too dark to do so, ought not to have gone out in the dark*, while *Pigot*, B. thought there was no evidence of negligence on the part of the defendants, and *Martin*, B. thought that there was evidence. The case was eventually compromised.

Saunders, at page 29, quotes from the case of *Siner and wife v. The Great Western Railway Co.* (37, L. J., Ex. 98), in which the plaintiffs were passengers on an excursion train which was longer than the station platform. The carriage, in which the passengers were riding, stopped at a point where there was no platform. "Several passengers got out, the husband followed, and his wife, taking both his hands, descended from the ironsteps to the ground, and in doing so her knee was hurt"—held that they were not entitled to recover. One of the Judges said that "the accident was owing to the fault of the plaintiff." *Bramwell*, B. remarked that if it was a dangerous place the defendants should be requested to put back. He said, it did not occur to the plaintiffs that if they stay in the carriage and were put to inconvenience, in being taken on, they had a remedy against the company, by action for not providing the proper means of getting out, adding, "that is the truth and the law, and one cannot help it if they do not know it; but they have no right if they do not know it to put themselves in peril, and then make a claim upon the company for compensation."

This question of contributory negligence was here properly submitted to the jury, and the rule of law being that if the fact of the defendants negligence be doubtful, he is entitled to the verdict; and there being evidence which made this case one particularly for a jury, who found in favor of the defendant, the verdict cannot be set aside, and the rule *nisi* for a new trial must be discharged.

TITUS ET AL. v. SULIS ET AL.

THE tenant in dower of wilderness land having, with the consent of C. R., one of the reversioners, sold all the hardwood timber growing upon the land to W. H. H., and allowed the same to be removed by the purchaser, contracted a second marriage with C. S. After the death of C. R., plaintiffs, as reversioners, without joining the heirs of C. R., brought an action of waste against the tenant in dower, C. S., her husband, and W. H. H., the purchaser, claiming damages for the injury to the land by the removal of the timber. The Judge who tried the cause having nonsuited the plaintiffs, and a rule having been taken to set the same aside,

Held, (1st,) that all the persons entitled as reversioners should have been joined as co-plaintiffs, but, as non joinder can only be taken advantage of by plea in abatement, and no such plea was pleaded, the nonsuit, if ordered solely on that ground, could not have been sustained.

(2nd.) That in such case the plaintiffs would be entitled to recover, not the full value of the injury done to the land, but only for such portions of the damage as was incurred by themselves alone.

(3rd.) That the tenant in dower was entitled to cut down the trees on the land for fuel, fencing, improvement, and cultivation, and purposes connected with such improvements, but not to sell the wood for other and different purposes, to the permanent injury of the reversioners, and that for such injury she was responsible to the reversioner.

(4th,) (*dubitante*). That an action will lie against a husband jointly with his wife for waste committed by the latter before their intermarriage.

(5th.) That W. H. H., the purchaser, acting, as he did, under authority of the tenant, was not chargeable for waste by the reversioners.

DESBARRES, J., now, (January 18th, 1875,) delivered judgment, as follows:—

This is an action for waste, in which the plaintiffs, as reversioners, claim damages for an injury to land set off and assigned to *Sarah Sulis*, one of the defendants, now the wife of *Caleb Sulis*, another defendant, as and for her dower in the estate of *James M. Roop*, deceased, her former husband. The plaintiffs, in their declaration, allege that the reversion in the land described in the writ belongs in equal and undivided moities to them and the heirs of the late *Christopher Roop*, who are not parties in this suit, and that the defendants injured their reversion in such lands by wrongfully cutting down and carrying away hard wood, and other trees growing thereon.

The defendants have pleaded severally. First of all, *Caleb Sulis* denies the wrongful cutting down and carrying away the trees and timber growing on the land, &c. Secondly, he says he did not injure the plaintiffs' reversion in the lands by cutting down and carrying away the trees, &c. Thirdly, he says he is the husband of *Sarah Sulis*, and that the cutting down and carrying away the trees, if any, was done before his intermarriage with her, and that the said *Sarah Sulis* was

then and now is tenant in dower of the lands, and the alleged cutting down and carrying away the trees by her was in the due and legal enjoyment of such estovers as she lawfully might take upon the lands, &c., and the removal and carrying away of said trees was in due course of improvement and cultivation of the land, and was no injury to the plaintiffs' reversion. Fourthly, the defendant, *Caleb Sulis*, says that the cutting down and carrying away the trees was done while defendant, *Sarah Sulis*, was the widow of *James M. Roop*, and tenant in dower of the land, and during the lifetime of *Christopher Roop*, and while *Christopher Roop* was tenant in common with the plaintiffs in the reversion of the land, and was then done by the leave and license and by the express permission of *Christopher Roop*.

The defendant, *Sarah Sulis*, first denies the wrongful cutting down and carrying away the trees. Secondly, says that she did not injure the plaintiffs' reversion in the lands by cutting down and carrying away the timber and trees growing thereon. Thirdly, that *Caleb Sulis* is her husband, and the cutting down and carrying away the trees, if any, was done before her intermarriage with him. That she was then tenant in dower of the land, and the alleged cutting down, &c., by her was in the due and legal enjoyment of such estovers as she lawfully might take upon the lands, &c. Fourthly, that the cutting down, &c., was done while she was the widow of the late *James M. Roop*, and the tenant in dower of the lands and during the life time of *Christopher Roop*, and while he was tenant in common with the plaintiffs of the reversion in the lands, and that such cutting was then done by the leave and license, and with the express permission of *Christopher Roop*.

The defendant, *William H. Haines*, by his first and second pleas, also denies the cutting down the trees, &c., and, thirdly, he says that during the life time of *Christopher Roop*, he purchased from *Sarah Sulis*, then the widow of *James M. Roop*, the hardwood trees, &c., on the land, with the consent of *Christopher Roop*, and that the cutting, &c., was done in pursuance of that purchase, and with the consent of *Christopher Roop*, the tenant in common of the reversion. Fourthly, that *Sarah Sulis*, being tenant in dower of the lands, and *Christopher*

Roop, being tenant in common of the reversion with the plaintiffs, he purchased the interest of *Sarah Sulis* as such tenant in dower, and that the cutting, &c., if any, was only such cutting, &c., as the said *Sarah* might lawfully have done.

The cause was tried on the issues taken on these pleas before Mr. Justice *McCully*, at *Digby*, in *September Term*, 1873, who, being of opinion that the non-joinder of the heirs of *Christopher Roop* was a fatal objection, and also that the action did not lie against the defendant, *Haines*, directed a nonsuit to be entered, and granted a rule *nisi* for setting it aside in order that the plaintiffs might have the opportunity of shewing before the full Court that they were entitled to recover. The rule was argued before the Court at the last *July Term*, and it being a case involving questions that we desired, but had not time to look into, judgment was for that reason reserved until the present Term.

I may remark at the outset that this is a form of action which has long been disused in *England*, and one which, so far as my knowledge extends, has not been resorted to here. An action on the case in the nature of waste has been substituted for, and is now the form of action adopted as well in *England* as in the *United States* for such injuries as the plaintiffs have complained of. The writ of waste, as a distinct form of action, was abolished in *England* by *3 & 4 William IV.*, chapter 27, section 26, and the action of waste is now in the form of an action on the case for damages. See *Bullen & Leake*, 423, and *2 Wms. Saund.*, 252 a. What has been abolished in *England* ought not to be brought into existence here, and in the absence of any legislation of our own on the subject, it would be safer to follow the form used there.

Now the first question that arises in this case is whether the action can be maintained by plaintiffs without joining with themselves the heirs of *Christopher Roop* as co-plaintiffs, who are tenants in common with them of the reversionary estate in the lot of land described in the writ. In *Addison on Wrongs*, page 67, it is said that if several persons are entitled to the reversion as joint tenants or tenants in common, they should all be joined as plaintiffs in an action for an injury to the reversion. See also *Bacon's Abr. Joint*

Tenants, k. That this is a sound and well-established principle there can be no doubt, but it is clear that the non-joinder can only be taken advantage of by plea in abatement, and here no such plea has been put in. See *Addison v. Overend*, 6 T. R., 766; *Broadbent v. Ledward*, 11 A. & E., 209; *Phillips v. Claggett*, 10 M. & W., 102. If, therefore, the nonsuit had been ordered solely on the ground of nonjoinder, and there had been no other ground of objection open to the defendants, I think the nonsuit could not have been sustained, and in that case the plaintiffs might have been entitled to recover damages, not for the full value of the injury done to the land, but only for such portion of the damages as was incurred by themselves alone. *Sedgworth v. Overend*, 7 T. R., 279; *Bloxam v. Hubbard*, 5 East., 407. But there are other grounds of objection worthy of consideration, to which I shall presently refer. Before doing so it may be proper to enquire what acts on the part of a tenant in dower constitute waste. In *Hilliard on Torts*, pages 154-5, it is defined "as a spoil or destruction in corporeal hereditaments to the disherison of him that hath the remainder or reversion in fee simple." 2 *Bl. Com.*, 231. In other words, it consists in such acts as tend to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance. "The felling of trees," he says, "is a prominent species of waste." At page 157 he says: "In *New York* the doctrine of waste, as understood in *England*, is not applicable to a new and unsettled country. Hence when the whole of a farm when leased for a rent is in a wild and uncultivated state, with the exception of a few acres, the parties will be held to have intended that the lessee should be at liberty to fell part of the timber in order to fit the land for cultivation, but not to destroy *all* the timber, and thereby irreparably injure the premises or permanently diminish their value. But where a tenant *cuts trees, not for the purpose of preparing the land for cultivation, but for the profit to be derived from a sale, he is guilty of waste.*"

It appears that the lot of land assigned to and held by *Sarah Sulis*, as her dower, was wilderness land, the trees on which she was unquestionably entitled to cut down and use for fuel, fencing, and the improvement and cultivation of the land and all purposes for which they were required in view

of such improvements, but she was not entitled to sell the valuable wood growing on the land for other and different purposes, to the permanent injury of the reversioners. The evidence, however, shews that *Sarah Sulis*, the tenant in dower, before her intermarriage with *Caleb Sulis*, actually sold all the hardwood on the land to *Haines*, one of the defendants, and that he, before that event, under the sale and authority so given to him, had cut and carried away and sold to other persons, who, together with himself, had cut and carried away the whole or nearly the whole of the valuable hardwood timber that stood upon the land, rendering it thereby of little value to the parties entitled to the reversionary estate therein. For such an injury as this, it might well be supposed, there ought to be some redress, as there certainly would be if the tenant in dower had continued to be the widow of *James M. Roop*, but she was now and had become the wife of *Caleb Sulis* some time after the injuries complained of had been committed, and one of the questions raised by the pleadings, and now submitted for our consideration, is whether *Caleb Sulis* can, in law, be held responsible for the tortious acts of his wife, committed before her intermarriage with him ; in other words, whether the plaintiffs can maintain this suit against *Caleb Sulis* under the circumstances of the law. It is true he may be held responsible for debts contracted by his wife before their intermarriage, but it does not at all follow that he can be held responsible for her tortious acts. This question, striking at the very foundation of the present action, was not touched at the argument by the counsel on either side. It was passed over and left to be answered by the Court.

I have carefully searched for a case to shew that the husband can be held responsible for the tortious acts of his wife under circumstances like this, and have found none, and can only say that until such a case can be discovered, I shall entertain some doubt on the subject. It is said in *Wms. Saunders*, 47, note W., that if a woman has been guilty of a conversion before her marriage, or a wife, without her husband, converts goods, during the coverture trover lies against husband and wife ; from which it may be inferred that the present action will lie against *Sulis* and his wife, for waste

committed by the latter before their intermarriage. There is also another objection raised in this suit, and that is that an action of waste will only lie against the tenant in dower, who is alone responsible for waste, by whomsoever it may be committed. The reversioner looking to the tenant, and the tenant having a remedy over in trespass against the wrongdoer. It is clear, therefore, that *Huines*, acting, as he did, under the authority of the tenant in dower, cannot be chargeable for waste by the reversioners. He may be accountable to the tenant in dower, but not to them.

In the view I take of this case, it is not necessary to express any opinion as to the effect of the license proved to have been given to the tenant in dower by *Christopher Roop*, the brother of *Catherine Titus*, one of the plaintiffs, to cut and carry away the trees for her maintenance and support, but I may say I do not think such a license can affect any right of action which she, *Catherine Titus*, has or may have for any injury sustained in her reversionary estate. It is possible the present action may lie against the defendants, *Sulis* and his wife, but it is by no means clear to my mind that it can. Taking all the circumstances of the case together, I think the rule for setting aside the nonsuit must be discharged, reserving the question of costs.

KERR ET AL. v. McLELLAN.

To an action of replevin brought by plaintiffs as administrators and administratrix of *J. K.*, defendant pleaded, among other pleas, a plea that the letters of administration were null and void, as having been granted by the Judge of Probate for the County of Colchester, whereas, *J. K.*, as defendant alleged, at the time of his death, had his domicile in the County of Cumberland. A verdict having been found for plaintiffs, defendant moved to set it aside, on the ground that the issue raised by the plea above recited was not submitted to the jury.

Held, that the issue was properly withheld. The Judge who tried the case was not at liberty to admit any evidence to impeach the validity of the letters of administration. If defendant wished to attack the letters of administration, his proper course was by appeal within the time prescribed in the statute.

DESBARRES, J., now, (January 18th, 1875,) delivered judgment, as follows:—

This was an action of replevin that was tried before Mr. Justice *Wilkins*, at *Amherst*, in which a plea was put in, among others, to the effect that the plaintiffs were not the

administratrix and administrators of *John Kerr*, deceased, inasmuch as the letters of administration, of which profert was made, were granted by the Judge of Probate for the County of *Colchester*, instead of being granted by the Judge of Probate for the County of *Cumberland*, in which, it was alleged, *John Kerr* dwelt, at a place called *Greenville*, at the time of his death, and that therefore the letters of administration so granted, and under which the plaintiffs claimed the property replevied, were null and void.

The letters of administration granted to the plaintiffs by the Judge of Probate for the County of *Colchester*, on being tendered in evidence, was objected to by *Mr. Townshend*, the counsel of defendant, but they were received by the learned Judge and read, subject to the objection. The cause being proceeded in, a verdict was found in favor of the plaintiffs, and on motion for a rule nisi to set it aside it was refused, and taken under the statute. At the argument of this rule, the only ground urged by defendant's counsel in support of it was that the learned Judge, in charging the jury, did not submit to them the issue raised on the plea to which I have referred, insisting that the question involved in that issue as to the domicil of *John Kerr* was within the province of the jury, and that, having been withdrawn, the verdict could not stand.

The question raised here is important, and ought to be settled, that it may become generally known whether the Court or the jury have the right of pronouncing on the validity or invalidity of letters of administration granted by Judges specially appointed to discharge that duty. I have always been under the impression that the power of cancellation was vested in this Court, and I am inclined to adhere to that opinion until I can see some good reason to change it. This very case furnishes an illustration of what the effect would be if the jury were permitted to interfere with and decide a question like this before a single Judge, instead of the Court of Appeal. Suppose the issue raised by this plea to have been submitted to the jury, and they had found, (though I do not think they could well have done so under the evidence,) that *John Kerr's* domicil or home was at *Greenville*, in the County of *Cumberland*, and that the letters

of administration granted by the Judge of Probate for the County of *Colchester* was consequently void. There would have been this anomaly, that while the Judge trying the cause had, by receiving the letters of administration in evidence, held them to be valid, the jury, by their finding, held them to be void. With such a plea as this upon the record, which, in a case like this, I think, ought not to be favored, what other course could the learned Judge have been expected to pursue other than that which he adopted in order to withdraw the issue which it raised from the consideration of the jury, to prevent the possibility of such a result as I have suggested. Can it be contended that the mere fact of such an issue being raised rendered it imperative upon the Judge to submit it with the view that he entertained and expressed, (which I think was right,) that though the letters of administration were voidable, they were not void. Speaking for myself, I may say that if I had been in his position, I would have felt myself constrained to act in the same way. But although the jury are not clothed with the power of cancelling letters of administration, there is a plain and unmistakeable way by which it may be done. In *1 Wms. on Exrs.*, 462, he says: "A probate or grant of administration may be revoked in two ways,—first, on a suit before the Court by citation; and, second, by an appeal to a higher tribunal to reverse the sentence by which they were granted."

Under our law the appeal is to be made to this Court, and it must be made within the time prescribed in the statute, but no appeal was ever made in this case, and therefore the letters of administration, when the cause was tried, were and are still in full force, and although there was evidence as to the domicile of *John Kerr*, it was evidence which did not at all touch the merits of the case; the important issue to be tried being the right of property in the goods, which was found by the jury to be in the plaintiffs. *Allen v. Dundas*, 3 T. R., 129, cited at the argument, was an action to recover money from defendant which it appeared he had paid to a person who had obtained probate of a forged will. It was held that payment of the money to the person who had obtained such probate was a discharge to the defendant,

a debtor of the intestate, notwithstanding the probate was afterwards declared null and void, and granted to the intestate's next of kin. It was also held that a probate, as long as it remains unrepealed, cannot be impeached in the temporal Courts. *Ashurst*, J., in delivering his opinion in that case, says: "Every person is bound to pay deference to a judicial act of a Court of competent jurisdiction. Here the spiritual Court had a jurisdiction over the subject matter, and every person was bound to give credit to the probate till it was vacated." *Buller*, J., in the same case, says: "It has been contended that probate is not a judicial act, but I am of opinion that it is a judicial act, for the ecclesiastical Courts may hear and examine the parties on the different sides whether a will be or be not properly executed. That is the only Court which can pronounce whether or not the will be good, and the Courts of common law have no authority over the subject;" adding, "*The probate is conclusive till it be repealed, and no Court of common law can admit evidence to impeach it.*" The same principle must, of course, be applicable to letters of administration, so that it would appear that the learned Judge who tried the case under consideration was not at liberty, under this authority, to admit any evidence to impeach the validity of the letters of administration granted to the plaintiffs. The same doctrine appears to be generally laid down in the American cases which is promulgated in *Allen v. Dundas*, though there may be some which do not go to the same extent. In *Griffith v. Frazier*, 8 Cranch, 23, *Marshall*, C. J., says: "To give the ordinary jurisdiction, a case by which in law letters of administration may issue must be brought before him. In the common case of intestacy it is clear that letters of administration must be granted to some person by the ordinary, and *though they should be granted to one not entitled by law, still the act is binding until annulled by the competent tribunal*, because he had power to grant letters of administration in the case." In *Peters v. Peters*, 8 Cushing, 543, *Shaw*, C. J., referring to an opinion of Mr. Justice *Jackson*, in *Smith v. Rice*, 11 Mass., 507, says: "It is undoubtedly true that in cases where the Probate Court is acting within its jurisdiction, pursuing the course prescribed

by law, if there is an indiscreet exercise of authority, the only remedy of the party aggrieved is by appeal."

It was open to the defendant to claim an appeal for the purpose of cancelling the letters of administration granted to the plaintiffs in this cause, if he felt aggrieved, and considered that they had been wrongly granted. He, however, did not think fit to pursue that course, but adopted one which, to my mind, is very objectionable; and it appearing from the evidence that the merits of the case are entirely with the plaintiffs, I think the rule *nisi* for setting aside the verdict must be discharged with costs.

I have not touched the subject of the domicile of *John Kerr*, to which the plea before spoken of refers, as I do not consider it a subject we are called upon to decide in this case. It is a subject which we may fairly assume was fully inquired into by the Judge of Probate before granting the letters of administration, and it will be time enough to consider it when properly brought before us.



LORDLY v. KIELY.

R. having been appointed a Queen's Counsel under a commission from the Governor-General of Canada, his precedence was questioned by W., who was his senior at the Bar of Nova Scotia, but held no appointment as a Queen's Counsel either from the Governor-General or the Lieutenant-Governor. W. moved to have his cause entered on the docket prior to that of R.

The motion was dismissed.

SIR W. YOUNG, C. J., now, (January 18th, 1873,) delivered judgment, as follows :—

This case, entered by *Mr. Wallace*, stood No. 60 on the docket of last Term, and *Ryan v. Hornsby*, entered by *Mr. Ritchie*, Q. C., stood No. 54. His right to precedence as Q. C., under the Governor-General's commission, attested by the Great Seal 26th December, 1872, was questioned by *Mr. Wallace*, who was his senior at the Bar, and the point was argued before us this Term by *Mr. W. A. Johnston* and *Mr. Weatherbe*.

We have looked at all the authorities cited, and some others, and have now to state our opinion, which turns mainly on the construction of our own Provincial Act, 37 *Victoria*, chapter 21, section 2. This and the preceding act, chapter 20, were borrowed from the *Ontario Acts*, 36 *Victoria*, chapters 3 and 4, but which are somewhat different, and were passed under different circumstances. It appears from the Dominion Sessional Papers of 1873, No. 50. that after the *British North America Act*, 1867, the Government of this Province were of opinion that they had not the power of appointing Queen's Counsel, nor have they appointed any in point of fact; whereas the Government of *Ontario* contended they had the power, and appointed seven Barristers as Queen's Counsel March 16th, 1871. On a reference to the Law Officers of the Crown, previously made, it appears by a dispatch from the Colonial Secretary to the Governor-General, *February 1st*, 1872, that the Law Officers had advised the Colonial Secretary that the Governor-General had the power to appoint Queen's Counsel, but that a Lieutenant-Governor, appointed since the Union came into effect, had no such power of appointing; thus affirming the opinion of our Government. The Colonial Secretary was further advised that the legislature of a province can confer by statute on the Lieutenant-Governor the power of appointing Q. C.'s, (which the Provinces of *Ontario* and *Nova Scotia* have now done). And with respect to precedence and pre-audience in the Courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor-General and the Lieutenant-Governor, as above explained.

The counsel for the claimant insisted that we ought to pay no regard to this despatch, or the doctrine it enounces, first, because the opinion of the Attorney and Solicitor-Generals was not inclosed under their hands, and, secondly, because, if it were inclosed, it is not binding on this Court. But it would certainly be a strange thing in a British Court, on a matter affecting the royal prerogative, to discredit a despatch from the Colonial Secretary addressed to, and acted on by the Governor-General; and as respects the Law Officers, while their official opinions have not the force of judicial decisions, we have only to turn to the valuable collections of *Chalmers* and *Forsyth*, and

to our own experience, to learn how often the opinions of the many eminent lawyers who have filled the crown offices in *England* have shed light in difficult and obscure questions, and guided us in our path. Besides, the opinions they have expressed in this instance are in entire accordance with our own. "A custom has of late years prevailed," says *Blackstone*, 3 *Comm.*, 28, and sec. 4 *Inst.*, 361., "of granting letters patent of precedence to such barristers as the crown thinks proper to honor with that mark of distinction, whereby they are entitled to such rank and precedence as are assigned in their respective patents; sometimes next after the King's Attorney-General, but usually next after His Majesty's Counsel then being." This is a power, concurrently with the appointment of Queen's Counsel, which the crown may still exert in this Dominion through its representative, notwithstanding the right conferred on the Lieutenant-Governor by statute, and which, on the erection of a Supreme Court of Appeal, may possibly be called into practice, conformably to the third clause of the royal commission to Lord *Monck*, 1st *July*, 1867. We observe that the *Ontario* Act of 1873 empowers the Lieutenant-Governor to grant a patent of precedence to any member of the *Ontario* Bar, but a like clause is omitted in our Act of 1874, although patents of precedence are referred to in section 4. It is contended that the effect of that section is to annul the precedence and pre-audience that have been enjoyed by the Queen's Counsel appointed under the Great Seal since *July* 1st, 1867 and to reduce them again to a level with the other and that nothing can restore them to their present letters patent which have not been, but may be, a Lieutenant-Governor, under the Great Seal of the Province. How the corresponding clause may have been omitted in the *Ontario*, where the Government had actually been advised by the Queen's Counsel without law, as our Government have no means of ascertaining. But to put that aside, and to put upon our clause, where the sole right of appointment was conceded, and degrade the Barristers' commissions under the Great Seal, would be not only unjust, but inconsistent with the acts of our own Government and the practice of this Court. An act so arbitrary could go beyond the scope of the despatch of

February 1st, 1872, which contemplated a legislative decision between Queen's Counsel appointed by the Governor-General and the Lieutenant-Governor, and not between Barristers who hold appointments from the Governor-General and Barristers who hold no appointments, either from the Governor-General or the Lieutenant-Governor.

The motion now made, therefore, cannot be entertained.

COX v. ELLIOTT.

DEFENDANT made a verbal agreement with plaintiff to pay him for any work which R. might require him to perform. Plaintiff performed work for R. accordingly, and procured from him an acknowledgment in the following form, which he presented to defendant: "Balance due Mr. William Cox from Alexander Ross, at this date, one hundred and fifty dollars, (Signed) Alex. Ross." At the trial a verdict was found in plaintiff's favor, and a rule taken to set the same aside.

Held, that though the paper signed by R. was not in form such a paper as he ought to have prepared or as plaintiff ought to have accepted, it was sufficient, after verdict, to show the amount and value of the work done by plaintiff for R., for which defendant had agreed to pay.

DESBARRES, J., now, (January 18th 1875,) delivered judgment, as follows:—

This action was brought to recover a sum of money from defendant for work and labor performed by plaintiff at the request of defendant, for one *Alexander Ross*, a ship-builder at *Maitland*, in the County of *Hants*. A verbal agreement was proved to have been made between the parties in *Nov.*, 1870, whereby defendant agreed and promised to pay plaintiff for any work that *Ross* might require him to perform, on his producing to defendant some paper or document showing the amount and value of the work done. It was also proved that *Ross* afterwards commenced to build a vessel for a company, of which defendant was a part owner, and that he (*Ross*) employed plaintiff to haul timber for him for that vessel, and that a settlement was made between the plaintiff and *Ross* by which it was found the value of the work so done by plaintiff for *Ross* amounted to \$150. No part of this sum was ever demanded from *Ross*, and no part of it was ever paid by him to the plaintiff. At the time of the making of the settlement referred to, a paper writing drawn and signed

by *Ross*, was by him handed to the plaintiff, of which the following is a copy :

“ MAITLAND, *Nov. 18, 1871.*

“ Balance due *Mr. William Cox* from *Alexander Ross*, at this date, one hundred and fifty dollars.”

“ (Signed.) ALEX. ROSS.”

The plaintiff exhibited this paper writing to defendant and demanded payment from him of the amount mentioned in it, but defendant refused to pay, saying he had never promised or made himself responsible to pay for the work performed by plaintiff for *Ross*, and, upon that refusal, the present action was brought.

The jury having decided that the contract made between plaintiff and defendant was an original contract, making the defendant permanently liable for work to be done by the former for *Ross*, and not, as contended for, a contract to become responsible for such work in case *Ross* himself failed to pay,—the only question for our consideration is, whether the paper writing of the 18th *November, 1871*, was such as in itself afforded sufficient evidence of the work done by plaintiff for *Ross*, and the amount which plaintiff was entitled to recover from defendant for such work. It must be conceded that the paper writing is not in form such a paper as *Ross* ought to have prepared, or such as the plaintiff ought to have accepted to shew the amount and value of the work done by plaintiff for *Ross*, and for which defendant had agreed to pay ; but there can be no doubt it was handed to and intended to be exhibited by plaintiff to defendant as a paper sufficient to give this information, nor can there be any doubt that the jury to whom it was submitted regarded it in that light. The evidence of *Braine* tendered by the defendant and rejected by the Judge was clearly inadmissible, for, as the contract entered into between the plaintiff and the defendant rendered the latter primarily liable for the work performed for *Ross*, it was of little consequence how or in what manner the accounts were kept between *Ross* and those for whom he was employed to build the vessel, nor was it at all material to inquire whether *Ross* had or had not been fully paid for the building of that vessel by those who had contracted with him therefor,

and therefore it appears to me that the rejection of the evidence proposed to be given on the part of the defendant on these points, furnishes no ground for setting aside the verdict. It will be recollected that the ground taken at the trial for a nonsuit and that taken at the argument for setting aside the verdict was, that the defendant was a guarantor and not an original contractor with plaintiff, and that as no statement from *Ross* of the work done had been produced, the plaintiff could not recover.

Both of these points having, as I think, been settled by the verdict of the jury, I am of opinion the verdict ought to stand, and that the rule for setting it aside ought to be discharged.

ENGLEY v. MCILREITH.

PLAINTIFF was tenant of a shop in a building owned by defendant, the upper portion of which was occupied by other tenants. It having become necessary to make certain repairs to the roof of the building, a portion of the roof was removed at defendant's instance without notice to the plaintiff. Owing to the negligent manner in which the work was done, rain fell into the building and ran through and injured the plaintiff's goods.

Held, that the work was done by defendant at his own risk, and that he was responsible to the plaintiff for the injuries sustained by her in consequence of the damage to her goods.

Semble, there being a count in which such a claim was made, that it might properly have been left to the jury to ascertain the damage sustained by plaintiff in consequence of the breaking up of her establishment and the loss of her business.

DESBARRES, J., now, (January 18th, 1875,) delivered judgment, as follows:—

This was an action on the case, with a count in trespass, in which the plaintiff claimed damages from the defendant for the destruction of her goods while prosecuting her business as a milliner, in this city, in a shop and premises demised to her by the defendant, over which several other persons occupied rooms and apartments, as his tenants. In the third count of the writ and declaration, which is the only count to which the evidence more particularly applies, it is alleged that while the plaintiff held and occupied the shop demised to her by the defendant, he unlawfully and negligently altered, opened and pulled down the roof, or a portion of the roof and covering of the house or building, of which her store formed a part,

through which aperture the water and rain, &c., fell, and came into her shop and premises, and damaged and destroyed her goods, stock and furniture, whereby she was deprived of the use and sale of her goods, and was compelled to close her business, and was otherwise injured, &c.

The learned Judge before whom this cause was tried, in presenting it to the jury, instructed them that the defendant's right to repair the roof of the building occupied by the plaintiff and his other tenants could not be disputed, but he was nevertheless of opinion that, as the defendant had not, before the opening of the roof, notified the plaintiff of his intention to do so, he, defendant, had, by his acts, made himself responsible for the consequences resulting, and in this, I think, he was quite right. Under these instructions of the learned Judge, which are not complained of by the defendant, the jury found a verdict for the plaintiff for \$300 damages, and in order to give the defendant an opportunity of having the case reviewed by the full Court, a rule was granted to set the verdict aside, as being against law and evidence, for improper reception of evidence, and for excessive damages.

At the argument of this rule, but two grounds of objection were taken to this verdict. First, that the action did not lie against the defendant under the circumstances proved; and, secondly, that the damages were excessive. As respects the first ground of objection, it may be remarked that there is no principle of law better understood by every member of the profession than that he who employs or directs a person to do an act prejudicial to another, though not present when the act is done, is responsible for its consequences, and if it were not so, great injuries would often be committed, for which the injured parties would have no redress. In this case the defendant employed persons, as he had a right to do, to repair the roof of his house, and in performing that service a hole was made therein, which was not filled up and repaired in time to prevent the rain falling into, and running through the building, by which the plaintiff's goods were injured. No intimation was given to the plaintiff of the repairs intended to be made to the roof of the building in which her goods were deposited, and no opportunity was afforded her of protecting her property against the unskilful or negligent

performance of the work. It was, therefore, an act done by the defendant, at his own risk, for which none other than himself ought to be responsible. The defendant might, if he had thought fit, have stipulated with those whom he employed to do the work in such a manner as not to injure the property of the tenants and occupants of the building, and if no such stipulation was made, the fault was his own, and he cannot cast the responsibility, which properly belongs to himself, upon any other person,—so far, at all events, as the plaintiff is concerned. The jury, by their verdict, have found that there was negligence on the part of the defendant in permitting the water to get into and run through the building upon the plaintiff's goods, and therefore the only question that remains is whether the damages awarded to the plaintiff were too large.

Looking at the evidence, which I have carefully read, I think the damages found by the jury were not at all disproportionate to the injury sustained by the plaintiff, either through the carelessness and negligence of the defendant himself, or those whom he employed to do his work. The learned Judge, in his charge to the jury, presented the case to them more favorably for the defendant, in one respect, than the evidence warranted. He told them that the plaintiff had no claim for compensation for the breaking up of her establishment, and the loss of her business. Now, I cannot help thinking that this, under the allegation in the third count in plaintiff's writ, might properly have been submitted to the consideration of the jury, and if it had been, the damages would probably have been much larger than they are. Of this the defendant can have no reason to complain, whatever ground the plaintiff may have.

Taking all the circumstances of the case into consideration, my own impression is that the damages are not excessive, and that the rule for setting aside the verdict ought, therefore, to be discharged with costs.

FISH ET AL. v. FRASER ET AL.

PLAINTIFFS having appointed defendants their agents for the sale of a vessel of which they were desirous of disposing, defendants offered the vessel for sale at public auction, at which she was knocked down to Paint, one of the defendants, for the sum of £800, who, a few days afterward, re-sold her at an advance of £300, which he appropriated to his own personal benefit. Prior to the sale at auction, defendants received two offers for the purchase of the vessel, one of an amount equal to that paid by Paint, and another of £50 more than that amount. The previous offers were not communicated to the plaintiffs, one of whom was present at the auction sale and made no objection thereto. A settlement was had with plaintiffs, but without knowledge on their part, either of the sale made by Paint or of the previous offers. Plaintiffs, three years after the sale to Paint, commenced proceedings to compel payment of the amount realized by him on the re-sale of the vessel, with interest.

Held (1), That Paint, being a trustee to sell the vessel, could not be permitted to buy without first receiving from every one of his *Cestuis que trust*, clear and explicit authority to divest himself of the trust and become a purchaser of the trust property.

(2.) That this was a case in which the Court would not recognize a bar short of the statutable period of six years.

(3.) That if the plaintiffs were debarred from bringing their action, it was for the defendants first to plead it and second to establish it affirmatively by facts proved.

Semble, That the suppression by Paint of the fact of the reception of the previous offers was of itself sufficient to decide the case for the plaintiffs.

WILKINS, J., now, (January 18th, 1875,) delivered judgment, as follows :—

The facts of this case are neither many nor complicated. Having twice presided at the trial of issues prepared in it, they are perfectly familiar to me. I shall analyze and state all those that are material with perfect accuracy. The plaintiffs were desirous to sell their vessel. *Paint* and his co-defendants accepted an agency and a trust for the sale of her. The plaintiffs, owners of the vessel—the *cestuis que trust*—all resided in the country; *Paint* and the other defendants in this city. A day was fixed for a sale at auction, at *Halifax*, under conduct of the defendants. *Lockhart*, one of the plaintiffs, and the ship's husband, was present at the sale. So far from there being any proof of his having been charged with any instructions from the co-plaintiffs, he said: "I went to *Halifax*, having heard of the intended sale, on the postponed day, from *Woolaver*,—a co-owner. I had nothing to do with the sale. I did not consent, nor was I asked to consent to it. I had no authority to consent." By these expressions he plainly meant to refer to the sale to *Paint*. Absolutely, the only authority that he derived from the other owners, in relation to the sale, *Lockhart* expressed in these words: "The other owners told me I had better go down, and

see about the sale." That he was clothed with an authority from the other owners to authorize *Paint* to divest himself of the accepted trust, by buying at the sale the subject of the trust, and selling it a day or two after at an advance, and putting the profits in his own pockets, is a pure assumption, without even the faintest support in the proved facts. How indispensable for that end a clearly-defined authority is, we shall presently see.

On this point, hear his absolutely uncontradicted testimony, bearing in mind that there were many other owners of the vessel, none of whom are pretended to have given authority to *Lockhart* to authorize their common trustee to buy, and two of whom, *Shand* and *Woolaver*, were examined at the trial; while from neither of them was it elicited that he, either by previous authority or subsequent ratification, sanctioned such an act on the part of their fiduciary. These are the words of *Lockhart*: "It never was discussed before me and the other owners whether *Paint* should be allowed to bid at the sale. I never, after the sale, discoursed with them on the subject." This was neither contradicted by him nor by other witness or other testimony. It stands on the minutes an uncontradicted fact. *Paint*, then, although *Lockhart* stood by his side at the auction, and heard him bid and buy, and was silent, was, as regards every one of the many absent non-consenting *cestuis que trust*, a mere gratuitous purchaser, violating deliberately an acknowledged rule of equity, which should have bound his conscience and governed his conduct. If he is not to be so governed, the rule has lost its power, and no *cestui que trust* is safe from the secret fraud of his trustee for sale. Whenever any authority shall be shewn that a trustee, having accepted a trust, can be relieved from his responsibility by mere implication from the conduct of those whom he represents subsequently to a *prima facie* violation of his trust duty. Whenever an authority can be produced to the effect that, after a trustee has bought under the circumstances which marked this case, he can effectually say in a Court of Equity: "One of many of my principals was present, and said nothing when I bought, and he and the then absent other principals afterwards divided among them the purchase money paid by me, and lay by, (in perfect ignorance, it may be, of the

protecting rule of equity,) for three years, and therefore I am not bound by the rule in question." Whenever this shall be judicially recognized, then, but not till then, can I feel it my judicial duty gravely to discuss that question. Whenever a decision shall be shewn sanctioning the proposition that it is in the eye of equity competent for a trustee for sale, at the very hour of sale, without any previous notice given to his *cestui que trust* of such his intention, without the express authority of all the *cestuis que trust*, (if there are more than one,) then and there given to him, to throw up his hand and say: "I am no longer a trustee; I act and bid for myself." When that is presented, I shall yield to its obligation my present opinion, that no trustee should be permitted so to act by a Court charged with the duty of protecting *cestuis que trust* from possible fraud on the part of their trustees. That the very opposite of this is settled law I shall not fail to shew.

That *Paint* did divest himself of his fiduciary relation at the sale, and not before, and, therefore, without even a previous intimation to the many absent *cestuis que trust* of his intention to do so, is indisputable, and avowed by himself. In relation to this, there happens to be before me, in a treatise of authority, a passage which I will read. *Lewin*, at page 338, on the subject of purchases by trustees, embracing in principle the subject of our inquiry, says: "Before any dealing with the *cestui que trust*, the relation between the trustee and the *cestui qui trust* must be actually or virtually dissolved. The trustee may, if he pleases, retire from the office, and qualify himself for becoming a purchaser by divesting himself of that character; or, if he retains the situation, the parties must be put so much at arm's length that they agree to stand in the adverse situations of vendor and purchaser, the *cestui que trust* distinctly and fully understanding that he is selling to the trustee, and consenting to waive all objections on that ground, and the trustee fairly and honestly disclosing all the necessary particulars of the estate, and not attempting a positive advantage to himself by means of any private information. The trustee will not be allowed to go on acquainting himself with the nature of the property up to the moment of sale, and then, casting aside his character of trustee, turn his experience to his own account." The passage thus cited

immediately follows these words, (p. 335.): "A trustee for sale is absolutely and entirely disabled from purchasing the trust property, whether it be real estate or chattel personal." Again, the same learned author says, (p. 336.): "The rule is now universal that, however fair the transaction, the *cestui que trust* is at liberty to set aside the sale and take back the property. If a trustee were permitted to buy in an honest case, he might buy in a case having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise." If, under those circumstances, the *cestui que trust* can take back the property, he can, of course, prevent the trustee from buying the property to his own advantage. Now, if there be such a thing as consequential reasoning, it necessarily follows as a corollary, from what I have extracted from *Lewin*, applying the undisputed facts of this case, that this trustee was not permitted to buy this vessel, which he had accepted a trust to sell, without, before he bought, receiving from every one of those whose trustee he consented to be a clear and explicit authority to divest himself of the trust, and become a purchaser of the trust property. That is equity, as I understand it, in relation to the rule and the facts in question.

This recognized exception to the universal rule speaks of an authority given by the *cestui que trust* before the trustee buys. The act of buying by a trustee, without previous authority, is, nevertheless, capable of being sanctioned and validated after the act, if the ratification be explicit, with full knowledge of all facts, and of the rule of equity, and not a mere ratification to be implied from a receipt from the trustee of the consideration money of his illegal purchase, and a dealing with it. On this point *Lewin's Treatise*, (p. 345,) expresses the language of equity and reason, thus: "Of course the *cestui que trust* may ratify the sale to the trustee by an express and actual confirmation."

Hear the further words of that able writer, which should, I apprehend, be deemed sufficient to settle the question before us. He says, (p. 346.): "The confirmation must be a solemn and deliberate act, not, for instance, fished out from loose expressions in a letter; and particularly where the original transaction was infected with fraud, the confirmation of it is

so inconsistent with justice, and so likely to be accompanied with imposition, that the Court will meet it with the utmost strictness, and not allow it to stand but on the very clearest evidence." Yet, further, to the very point, (345.): "There must be no *suppressio veri*, but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case." On this point, that there must be no *suppressio veri*, if we turn to the evidence, we find that such existed in the case, and was so found, on undisputed evidence, by the jury. *Paint* admitted that fourteen days before the sale he had an offer, from *Mynock*, of £850, being £50 more than he bought for, and it was proved and found by the jury that several days before the sale *Drillio* had offered that amount which *Paint* gave. Neither of those offers was communicated to the plaintiffs. The jury expressly found the fact. Has the effect of this been considered? If the rule be as stated by *Lewin*, the fact should decide the case for the plaintiffs. In this connection it is most important to bear in mind that, although *Shand* and *Woolaver*, two of the owners, were in the witness box, and could have proved when, relatively to *Paint's* sale to *Martell*, they acquired, (if they did acquire it,) knowledge of that sale, neither of them was interrogated on that point, and *Paint* failed altogether to shew that when the settlement, (relied on as acquiescence,) took place, the plaintiffs had any knowledge of the fact of *Paint's* sale to *Martell*. Knowledge of it at any time is not brought home to any one of the plaintiffs except *Lockhart*, who says: "Some time after the sale I first heard of *Martell's* purchase." That is the sole evidence on the point. Thus, then, are we bound to consider the settlement was made without knowledge had by any one of the plaintiffs, except *Lockhart*, of the all-important fact that *Paint*, a few days after his purchase, made it available to his own personal benefit, by pocketing £300 of profit, and that within the short period of three weeks after he had, and while suppressing the facts from his *cestui que trust*, declined an offer made to him of a larger sum than he bought for at the auction.

. The jury were asked, under the issue settled by the counsel, "Did the other owners authorize *Levi Lockhart* to acquiesce in the sale at auction?" The answer is, "They did

not." Now, in view of this point, and the comment from the evidence which I have already made upon it, I shortly advert to *Lewin's* last rule, governing the exception to the general rule, bearing in mind that every one of these numerous plaintiffs had a distinct and several interest in the vessel. *Lewin* states it thus, (346,) : " Where the *cestuis que trust* are a class of persons, as, for instance, creditors, the sanction of the major part will not be obligatory on the rest ; but the confirmation must be the joint act of the whole body. *Ex parte Lacy*, 6 Ves., 625-30, and note b." Surely the effect of this cannot have been considered. When it is assumed that the plaintiffs, all of them are debarred from this, their equitable claim, on the ground of delay, or laches, or acquiescence, or whatever it may be called, because three years at the utmost had elapsed between the sale and the institution of the suit, it becomes necessary to bear in mind that we are dealing with an important and stringent rule of equity law, on the observance of which it depends whether *Paint* has or has not legally put off that office of trust which he, by contract, accepted, for and in relation to one and all of these plaintiffs. If these last are, from lapse of time, debarred from the Court of Equity, it was for *Paint* first to plead that, and, secondly, to establish it affirmatively by facts proved. It was for him to shew, not by vague inferences from the conduct of his *cestuis que trust*, or from any proved fact, that these last, and all of them probably, had at a particular time knowledge of facts warranting an inference of acquiescence, but to shew the knowledge, at that particular time, as a proved fact. And in doing so he would not have had any difficulty to encounter. It was in his power to have placed every one of the plaintiffs in the witness box, and interrogated him on the point. It is unnecessary for me to consider whether this is within the view of equity a direct trust, in which case there is no bar from lapse of time, or a case of indirect or constructive trust, to which case a bar is admitted to exist. It is enough to say that on the clearest principles this is a case in which a Court of Equity will not recognize a bar of a period short of the statutable limit of six years, applied to an analagous case.

The plaintiffs here invoked the aid of equity to compel *Paint* to disgorge £300 and interest of money belonging to the plaintiffs, that he withheld from them contrary to good faith. If an action for money had and received had been brought in the Court of Common Law, (and no trusteeship were interposed,) the prosecution of the claim would have been within a statute which equity recognizes no less than law. These are the words of Lord *Manfield*, in *Eldridge v. Knott*, Cowp., 214: "There is no instance of setting up any length of time, within the limit fixed by the statute, as a bar to the demand." This language has been used in equity on the very subject of enquiry: "A sale cannot in general be set aside after a lapse of 20 years." *Price v. Byrn*. cited; *Campbell v. Walker*, 5 Ves., 681. "The application must be made within a reasonable time." Here, however, as already noticed, we have not in proof the means of ascertaining what time these claimants suffered to elapse before they applied for relief, although we know it was within the limit of three years.

It may as well, also, be noticed what the rule is respecting taking advantage of laches in prosecution of such a claim as this. The rule is thus stated, (*Lewin*, p. 566.): "The defendant may avail himself of the statute of limitations, when the bar to the claim appears on the face of the bill, by demurrer; when it does not appear on the bill, by plea; or the defendant may pray, on his answer, to have the same benefit at the hearing as if he had pleaded the statute; but if he neither demur nor plead, nor pray to have the same benefit as if he had pleaded, he cannot shelter himself under the statute at the time of the hearing; though it seems the Court itself may still, in its discretion, refuse to grant relief after the limited period." Here there is neither a bar apparent on the writ, nor plea in bar, nor the prayer referred to. How, then, even if facts and law would admit of it, can relief be refused here, where one-half only of the lowest statutable limit of time for a bar elapsed before complaint marks the case?

In view of all this, I confess myself utterly unable to conceive of any ground on which the plaintiffs can be refused the equitable relief sought by their writ. The net amount of profits made by *Paint*, by sale of the vessel, a pure matter of computation and adjustment, if needed, being ascertained, the

plaintiffs are, in my opinion, entitled thereto, with lawful interest from the time of the sale by *Paint* to *Martell*, and to have a decree accordingly, with costs; this appeal being dismissed with costs.

LORDLY ET AL. v. MCRAE ET AL.

A RULE for a new trial will be refused where the Court can see clearly that real and substantial justice has been done.

A wrong observation by a Judge on a matter of fact which is left as a matter of fact for the jury is no ground for a new trial.

YOUNG, C. J., now, (January 18th, 1875,) delivered judgment, as follows:—

This action is brought by the payees of two promissory notes, alleged to have been signed by *Alexander McRae*, of whose estate the defendants are administrators, and by his son, *Norman*; and the sole defence is that they are not the notes of the intestate.

The son owed the plaintiffs, who had a judgment against him, and employed *Alexander Cameron*, of *Baddeck*, to recover or secure their debt. He represented to them that he had so done by taking the son's note for 2s. 6d. in the pound, and the father's and the son's two notes, (being the notes in this suit,) for 10s. in the pound; upon forwarding which, shortly after their date, the plaintiffs sent to *Cameron* a satisfaction piece for their judgment, which he delivered to the father. *Cameron* is a subscribing witness to the notes, and if they are not genuine, it follows that he grossly deceived the plaintiffs, besides committing a fraud on *McRae*. Having been examined under oath before two Judges and two juries, and on each occasion sworn that the notes were signed or acknowledged by *Alexander McRae*, in his presence, (though his evidence differs and he was contradicted in some minute particulars,) yet, as he testified on each of the two trials in this matter to the material facts, and as they are all of recent occurrence, it seems an irresistible conclusion that, if the notes are not genuine, he has deliberately sworn to what he knows to be false. Under these extraordinary circumstances, I concur with the judge who charged the jury in thinking that the testimony to defeat the notes should be convincing, clear, and satis-

factory. I shall touch only the leading features of the evidence on the trial, as it is obvious, from what I have already said, that this was eminently a case for the jury. *Cameron* sets out with stating, in answer to the first question that was put to him, that he resides at *Baddeck*, and among other offices held by him is Collector of Customs and Registrar of Probate. He then proceeds to say, "that he saw *Alexander McRae* sign the two notes in my presence and *Norman's*, and that he has not the slightest interest in the suit." He next details a conversation with the old man, who refused to become responsible for more than \$2 in the pound of his son's debt. He wanted *Cameron* to say to the plaintiffs that he would have to pay the most of it, and he hoped they would not be hard about the interest. He stipulated for a discharge of the judgment before *Cameron* should part with the notes. *Cameron* sent for and obtained the discharge, which he gave to the old man in presence of *Norman*. The old man signed the notes in *Norman's* house at the same time with *Norman*, and understood the transaction thoroughly. This is the substance of *Cameron's* direct examination.

The cross-examinations turned chiefly upon some variations between his present and his former testimony. He swore on the preceding trial that the old man either signed the notes in his presence, or acknowledged he had signed them, when he, (*Cameron*,) witnessed them. He states the reason that he was under that impression and had hunted up the correspondence, by means of which he was now sure as to the signing. He produced the copy of a letter dated 8th of *May*, 1868, which helped him to remember that he was present and saw *Alexander* sign. The Judge's minutes then say: "He is asked by defendant's counsel, and reads the letter."

I note this entry, which is binding upon us, as this letter, which, as it appears from the charge, was read by defendant's counsel to the jury, is of great consequence, and but for these circumstances could not have been evidence in the cause. *Cameron* further said: "I think on the last trial I said the note was signed by the old man, in my office. I don't say so now." *Mr. Brodie*, one of the defendants, testified, "that *Cameron* said on the former trial that the two notes were written by him, and signed by *Alexander McRae*, in his

office, with the same pen and ink he wrote the notes with. He swore he did not observe the difference of ink before." I notice these variations, or considerations, because they were so largely insisted on at the argument. Before the jury they were fair matters of comment, but the jury having passed upon them, and the sole constitutional and legal judges of the fact having thus settled the main question, we cannot set aside their verdict upon any opinion of our own, were it even hostile to the plaintiff's case.

Besides these attacks upon *Cameron's* testimony, there were produced, among other witnesses, three of the managers of our principal banks, who compared *Alexander's* signatures to the two notes with other proved or admitted signatures of his, and gave their opinion as experts, and the effect and nature of such testimony was discussed at the argument, and a few cases cited. The doctrine upon this branch of the law is to be found in *1 Greenleaf on Evidence*, 12th edition, section 440, a. and b.; and in *2 Taylor on Evidence*, fol. 941 to 945. The numerous cases in the English and American Courts reveal much difference of opinion, and many nice distinctions; but all these were set at rest, and a plain and intelligible rule enacted in England, by the 27th section of the *Common Law Procedure Act*, 1854, which we have copied *verbatim* in our *Revised Statutes*, chapter 96, section 39. The course pursued at the trial was, in the main, conformed to this section. The two notes, being the disputed writings, were compared with other writings or signatures of *Alexander*, proved to the satisfaction of the Judge to be genuine, which comparison was permitted to be made by witnesses, and such writings, and the evidence of the witnesses respecting the same, were submitted to the Court and jury, as evidence of the genuineness or otherwise of the notes.

It would be strange, indeed, in a matter so familiar to us all, and would argue a wonderful amount of stupidity, or indifference in the jury, if they did not themselves examine and compare all these writings, while in the box, which it was their privilege, and the duty of the Judge to instruct them, to do. The opinion of the experts, and of others besides them, differed as to the genuineness of the notes, but the verdict for the plaintiffs has settled all that, and entitles them to our

judgment, unless evidence has been improperly received or rejected, or there was misdirection in the charge.

I shall notice only such objections to the evidence as could admit of any question. The declarations of *Alexander McRae*, as to the signing of the notes, were clearly inadmissible. Those of *Cameron* were not, and he might have been interrogated as to any he ever made for the purpose of contradiction. The docket of the judgment against *Norman McRae* and the satisfaction piece were admissible as part of the *res gestæ*. The signatures of the defendants' counsel were inadmissible. So also were those of Judge *Wilkins*, and I can't understand, if objected to, how they got in; but at all events, under section 211 of our *Practice Act*, their reception does not necessitate a new trial.

Now, as to misdirection, which, in rules under the statute, has become a sort of stereotyped objection in this Court, I took occasion, in the case of *Peters v. Silver*, in 1867, to review the leading authorities in England and in our own Court, including 4 *L. T. R.*, 471; 1 *McLellan & Young*, 286; and 5 *Scott's Reports*, 228, which are not in *Archbold*, in *James's Reports*, 337, and 2 *Thomson*, 18, shewing that a new trial is rarely, if ever, granted for misdirection in point of fact, and that a large discretion is entrusted to the Judge. In *Peters v. Silver*, where the facts were put strongly for the plaintiff, and the charge was warmly expressed, as in this case, we upheld the verdict, because the presumptions were all presumptions of fact, and involved no legal principle that could be disputed. So in this case, where there is no law that is not of familiar use, the Judge left the evidence of the experts and the whole case to the jury, accompanied, it is true, with observations in a bolder and more decided tone than is often heard from the Bench, but which the circumstances, in his opinion, the charges against *Cameron*, justified and required. In *Belcher v. Prittie*, 4 *Moo. & Scott*, 295, 10 *Bing.*, 408, it was held that it is no ground for a new trial for misdirection that the Judge expresses a strong opinion upon the facts either way, the whole being left to the discretion of the jury, where the question is one peculiarly for their consideration. So in *Davidson v. Stanley*, 2 *M. & G.*, 728, per *Bosanquet* and *Coltman*, J. J.: "A Judge has a right to state what impression

the evidence has produced on his mind. The learned Judge seems to have made strong observations, but not stronger than he was justified in making."

A wrong observation by a Judge, on a matter of fact, which is left as a question of fact for the jury, is no ground for a new trial *Taylor v. Ashton*, 11 M. & W., 401. *Tindal*, C. J., goes further in *Moore v. Tuckwell*, 1 C. B., 609, and says: "It is not the practice, as stated at the bar, that in all cases where there has been a misdirection, a new trial must be granted *de jure*, because a bill of exceptions might have been tendered, (a reason not applicable here, but the conclusion is,) for where the Court can see clearly that real and substantial justice has been done without a new trial, the rule has been refused;" for which he cites several cases.

On these grounds we are of opinion that the rule *nisi* must be discharged.

BEULAIR v. GILLIATT.

In an action to recover a debt, defendant produced a certificate of his discharge as a bankrupt.

Held, That it was not competent to the plaintiff in this action to shew irregularity in the proceedings in the Insolvent Court, or to attack the discharge on the ground that defendant was not a trader, and therefore not a legitimate subject of the jurisdiction exercised.

WILKINS, J., now, (January 18th, 1875,) delivered judgment, as follows:—

The question that is depending in this case substantially is whether, in an action brought to recover an alleged debt, in answer to which defendant produced a certificate of his discharge as a bankrupt, it was competent for the plaintiff to shew in this Court irregularity in the proceedings of the Insolvent Court below, and especially that those proceedings were void, on the ground that the defendant was not a trader, and therefore not a legitimate subject of the jurisdiction exercised. The learned Judge who tried the cause strongly inclined to the negative view, and I entertain no doubt that he was right. This Court has in this very Term affirmed, in an analagous case, the principle of the learned Judge's opinion.

It decided, in *Kerr et al. v. McLellan*, that where letters of administration, granted in the case of an intestate, by a Court of Probate, were not objected to in that Court on the ground that the Court had no jurisdiction, the letters, (except in the extremely exceptional case of the proved life of the assumed deceased,) could not be impugned in the Court above otherwise than by means of an appeal under the statute from the decree of the Judge who granted the administration. This Court, in that case, was influenced by the consideration of the great inconveniences and injuries which might result to persons not before the Court from a different decision, and it is quite obvious that a like consideration presses upon us with no less force here.

Not an objection was urged at the trial in this Court which could not have been taken and adjudicated on before the Judge of the Insolvent Court. Even the point that the whole matter *sub judice* was *coram non judice*, on the ground that the defendant was not a trader, could have been taken. *Spooner et al. v. Juddow*, 6 M. P. C. C., 257, is decisive to shew that where, (irrespective even of the form of the pleading,) it appears to a Judge from proved facts that the matter in which he is called on to adjudicate is not within his jurisdiction, he not only may, but must so decide, and decide by giving judgment against the party who instituted the proceedings before him. The point of total defect of jurisdiction in the Insolvent Court was taken in this Court only incidentally, and not directly, as it might have been if the whole proceedings taken below were brought up formally and regularly before us, for the purpose of judicial review. In this state of things we are bound to assume, as there has been no appeal, that that final and conclusive judgment of discharge of the insolvent which section 104 of the *Insolvent Act* speaks of and recognizes has been given by the Judge below. The judgment, therefore, pre-supposes and involves the element of a satisfactory ascertainment by the learned Judge of the Insolvent Court that this defendant was a trader within the meaning of the *Insolvent Act*.

From these considerations it follows, I think, that judgment must be entered for the defendant.

HUNTER v. McDONALD.

PLAINTIFF in ejectment claimed under an alleged last will, a draft of which was put in evidence. Assuming the will to have been properly executed, which did not clearly appear, there was no evidence that it was ever seen or certainly known to be in existence from the time at which it was made, down to the trial. A verdict having been found for defendant, a rule taken to set it aside was discharged with costs.

MCCULLY, J., now, (January 18th, 1875,) delivered judgment, as follows :—

This was an action of ejectment, tried before Mr. Justice *Wilkins*, at *Amherst*, at the *October Sittings*, 1873, when a verdict passed for defendant. Plaintiff obtained a rule nisi, under the statute, to set aside the verdict, and for a new trial, on a number of grounds specially set out in the rule.

The plaintiff claimed under an alleged lost will, a draft of which was put in evidence. The date of the draft is 13th *August*, 1865, and the party under whom plaintiff claimed as testator, *Charlotte Mickie*, died in *December*, 1869. One *Cyrus Bent* prepared the draft and wrote the will. *D. Creed*, a witness, says : “ I was called in to attest her, (*Mrs. M.’s*,) will. My daughter, *Mary Creed*, was present, with *Cyrus Bent*. Either she signed or made her mark to a paper, saying, ‘ This is my last will and testament.’ All were present at the same time, I think. *Bent* was there. My daughter and I then and there subscribed our names to the paper.”

Bent says : “ I prepared a will for her in 1863. I was present at its execution at *Mrs. M.’s* house. *D. Creed* and his daughter were then present. It was signed by *Mrs. M.* and all of us named besides. I kept the draft of the will. I copied the will from it. This is the draft. The will was precisely a copy of this. I put the will, after execution, into an envelope, marked the envelope as her will, and gave the envelope, with the will in it, to the testatrix. After that time I never saw the will.” On cross-examination, he says : “ In copying from the will I struck out ‘ *Charlotte*,’ nothing else. There was some mistake about the name. I read the will over to the testatrix before the execution.”

The clause of chap. 81, *Revised Statutes*, sec. 5, requiring that “ the signature of a (valid) will shall be made or acknowledged

by the testator in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator," may have been complied with. But the proof is by no means satisfactory that the witnesses attested and subscribed the paper in the presence of the testator. *D. Creed* says: "All were present at the same time, I think. *Bent* was there." This refers, probably, to *Mrs. M.*, himself, his daughter, and *Bent*, when *Mrs. M.* signed. Then he adds: "My daughter and I, *then and there*, subscribed our names to the paper." But the proof is not positive that *Mrs. M.* was *there* when they signed as witnesses. At most, as to this essential feature, his testimony is all were there when she signed. Now, although no form of attestation if necessary, it is an element of the case that the draft produced does nothing more by way of attestation than say: "Signed, sealed, and delivered in the presence of ——." It is not enough, in so solemn an instrument as a will, one which, as to its execution, has always been jealously regarded, and subjected to the rigid literal construction of the *Statute of Frauds*. It is not satisfactory that the subscribing witness should verify its execution,—that is to say, the attestation and the subscribing by the witnesses, in testator's presence, qualifiedly, as in this case. Leaving it to be inferred that, because all were present when testatrix signed, that she was present when they signed. What he says may be true. He and his daughter, *then and there*, may have subscribed as witnesses, and the testatrix may have left the room before they signed. And when he says all were present at that time, he evidently refers to the time when she signed, and make her mark, &c., but not necessarily to the time when they, the witnesses, signed. *Carrigan v. Carrigan*, 2 Old. Rep., p. 8, is full and to the purpose, and the cases are all reviewed. There the testator was in a condition to see the witness sign if he choose to look. Here she may have been present, for she had just previously signed the paper. Upon this point see *Taylor on Evidence*, p. 920, sections 967 and 968, and cases cited. "And so it seems and follows," says *Taylor*, "that if the witnesses sign before the testator, the will is void, though he immediately after affixes his signature

in their presence, and though they subsequently seal the document."

But assuming that this will was well executed, another difficulty arises of an equally or more serious character, and that is as to its non-appearance. A vast amount of testimony was tendered on the trial, which does not seem to have been objected to, and the learned Judge has consequently entered upon his notes conversations among third parties, letters, &c., which, on an issue of *devisavit vel non*, could not, and should not have any bearing on the case.

From the date of the will up to the date of the trial there is no evidence that the document was ever seen, or certainly known to be in existence. The plaintiff himself, (line 257,) says: "I saw, in a little gilt box in her drawer, a yellow envelope, with 'will' written on it. I saw it last about a year before her death, in that place. I had seen it different times before that, in the same place, and in the same box and drawer." But no presumption arises that the will under which he claimed, or any other, (and deceased might have had a will before the one in question for aught that appears,) was in the envelope. Nor does *Bent* describe the color of the envelope he used. *Bent* says, (line 51.): "She spoke of making some change in her will two or three times after its execution. Had talked of it within two years before her death." *Smith's* deposition is of no value. It was only his opinion that *Mrs. M.* referred to her will. Upon this point *Taylor*, (section 135, p. 170,) says: "If a will, traced to the possession of the testator, and last seen in his custody, be not forthcoming at his death, the law presumes that it has been destroyed by himself, *animo cancellandi*. And this presumption, which is absolutely founded on good sense, must prevail, unless there be sufficient evidence to rebut it." Citing *Whiteley v. King*, 17 C. B., N. S., 756, and *Fisher's Dig.*, and the cases collected, p. 8823.

Had defendant's counsel asked for a nonsuit at the close of plaintiff's case, I do not see how it could have been refused. He, however, proceeded to call witnesses, and the learned Judge, having submitted the case to the jury, who found for defendant, propounded a question to them which elicited the

following reply: "We are of opinion that it, (the will,) was not in existence at the time of her, (testator's,) death." There is no evidence and no presumption to the contrary.

The rule *nisi* must be discharged with costs.

BURNS v. SNOW.

G. W. B., having purchased a quantity of goods from the firm of B. & M., gave them in payment therefor a promissory note made by himself, payable to the order of B. & M., upon the back of which the defendant, for the accommodation of G. W. B., had endorsed his name. In an action by plaintiff, surviving partner of the firm of B. & M., against defendant, there being no evidence of an intent on the part of defendant to stand in the ordinary relation of an endorser to the payees,

Held, that defendant was not liable.

DESBARRES, J., now, (January 18th, 1875,) delivered judgment, as follows:—

The plaintiff, by the first count in his writ, claims a right to recover from the defendant, as the surviving partner of *William Murray*, deceased, the sum of \$255.75, on a promissory note, dated 1st *December*, 1869, which he alleges was made payable to himself and partner, for that sum, eight months after date. In the second count he claims to recover on a note made by *George W. Barss*, bearing the same date, payable for the same sum, and at the same time as the other, to the order of *Burns & Murray*, at their office in *Halifax*, stating it to have been endorsed by *Burns & Murray* to the defendant, by defendant again endorsed to the plaintiff and *William Murray*, deceased, and alleging that this second note was duly presented for payment at the office of *Burns & Murray*, and dishonored. And in the third count the plaintiff claims on a guarantee alleged to have been made by defendant on the same day as the note, whereby defendant promised that, in consideration plaintiff and *William Murray* would sell and deliver goods to *George W. Barss*, and take from him a promissory note for the price of such goods, amounting to, \$225.79, payable in eight months after date, he, defendant would pay the amount at maturity.

The case was tried before His Lordship the Chief Justice, without a jury, who, on the evidence before him, decided in

favor of the defendant, giving the plaintiff leave to bring the case under the review of the whole Court. It was argued before us during the present Term by *Mr. J. N. Ritchie, Q. C.*, for plaintiff, and *Mr. Meagher*, for defendant. It appears that the only evidence produced by plaintiff in support of his case at the trial was the deposition of *George W. Barss*, who admitted himself to be the maker of the note set out in the second count of plaintiff's writ, and proved that defendant, at his request, signed his name on the back of the note, and did so entirely for his accommodation. That defendant was the first person who endorsed the note, and when he did so the words, "*Burns and Murray*" were not on it. The names of the latter having been placed on the note as first endorsers, "without recourse," after defendant had affixed his name thereon, the question is whether the defendant, under these circumstances, can be held responsible either as maker, endorser, or guarantor for the payment of this note.

The case of *Peck v. Phippen*, 9 U. C. Rep., Q. B., 73, was relied upon by *Mr. Ritchie* as sufficient to establish the plaintiff's right to recover in this case. In that a promissory note was made and endorsed under circumstances similar to the present, and it was held that although the plaintiffs had not endorsed the note when defendant endorsed it, and though their endorsement, making them stand as first endorsers on the note, was not written until after the action was brought, yet that such endorsement was sufficient. If this case stood alone, it would be an authority by which we would feel ourselves warranted to be governed. But as it is in conflict with other cases decided in the same Court, as well as with English cases which we are bound to respect, and contrary also to a decision of our own in *Morton v. Campbell*, *Cochrane's Rep.*, 5., I do not think we ought to regard it as binding upon us. In *West v. Brown*, 3 U. C. Rep., Q. B., 290, it was held that a party endorsing his name on the back of a note not negotiable, or, if negotiable, not endorsed by the payee, cannot be sued as endorser by the payee. In this case *Macaulay, J.*, remarked that it was similar to *Thew v. Adams*, decided in that Court in 1838, in which, after the best consideration, he could not find any case that a party endorsing his name on a promissory note not negotiable, or, if

so, not endorsed by the payee, could be made responsible to the payee as a maker, or endorser, or guarantor; adding that there, as here, it was sought to make him chargeable as an endorser to the payee, a thing inconsistent in itself. See also *Shibeck v. Porter*, 14 U. C. Rep., Q. B., 430. But the case, (a leading one,) to which the greatest weight must be given, is that of *Guinnell v. Herbert*, 4 A. & E., 436, which shews that the defendant, who endorsed, could not be sued as maker of the note; and if not as maker, I do not see how he can be sued as an endorser by the payee. The case of *Denton v. Peters*, Law Rep., 5 Q. B., 475, is, I think, an authority to shew that as between endorser and endorsee there must have been the element of an intent to stand in the ordinary relation of an endorser to the payees; that is, to guarantee the payment of the note to them as endorser in case the maker made default.

There is no evidence of any such intent in this case, and therefore it appears to me the plaintiff is not entitled to recover against the defendant, either under the first or second count of the writ. See *Story on Promissory Notes*, section 133. It was not pretended at the argument that the plaintiff could recover against defendant on the third count in the writ, as a guarantor, there being no evidence of any collateral undertaking, or any consideration for a guarantee, and therefore I think the judgment of the learned Chief Justice was right, and must be upheld.

MURDOCH v. BELLONI ET AL.

PLAINTIFF, who was mortgagee of certain coal areas, &c., having commenced an action of foreclosure against the defendants, who were trustees of the same, and obtained an order of sale, B., one of the *cestuis que trust*, applied to the Court on petition setting out that shortly before the date of the order there was ready for shipment at the mine a large quantity of coal which, if sold and the proceeds applied to that purpose, would be more than sufficient to pay the amount due on the mortgage, and claiming that the sale of the mine, under the circumstances, would be a great injustice.

Held, that, where equity to the *cestui que trust* requires it, especially if the mortgagee be not prejudiced thereby, the Court possesses the power and will exercise it to dispose of such portions of the mortgaged property as will least injure the mortgaged property and yet extinguish the debt.

The case was referred to a Master to take evidence on the subject of the coals alleged to have been raised, and report.

McCULLY, J., now, (January 18th, 1875,) delivered judgment, as follows :—

Action of foreclosure of mortgage, and an order made by Mr. Justice *DesBarres*, sitting in Equity, dated 27th *May*, 1874. From this order an appeal was taken by *Belloni*, on a petition dated *June* 1.

The learned Judge deferred the sale, that the plaintiff might have an opportunity of applying to the Court *in banco* in *July*, but the cause not being reached, on a special application, and upon terms as to costs, expenses, interest, &c., the case was further continued till the present Term. It was now heard. Messrs. *Henry*, Q. C., and *James McDonald*, Q. C., for petitioner, *Belloni*; and *James Thomson*, Q. C., for *H. Lawson*, *J. Taylor*, and *Cathcart Thomson*, defendants, Trustees; and *Mr. Ritchie*, Q. C., for plaintiff.

Without descending to minute particulars, or expanding the facts more than necessary, it may suffice to say that *Belloni* and others were the proprietors of certain coal areas and premises, mines opened and unopened, at *Cow Bay*, *Cape Breton*, known as the *Block House Mines*. That defendants were legally constituted Trustees of the property, under deeds, and a declaration of trust, which is produced, and in no way contested. *Belloni* alleges under oath that he is proprietor of two-thirds of the stock of a company incorporated to work these mines, and which are valued at the sum of five hundred thousand dollars. The right of plaintiff to foreclose is not denied, but *Belloni*, the principal *cestui que trust*, having intervened in the suit before order made by petition, claims that, as the property consists of a coal area, and areas and seams of coal, opened and unopened, specially described in the mortgage, and that, inasmuch as there was, on the 14th day of *April*, 1872, and shortly before the date of said order, on the bank, ready for shipment at the said mine, at least ninety-five thousand tons of coal, worth, at the place of shipment, at least two dollars per ton. That this coal, which was cut and raised from the mine during the (then) last season, if sold, and the proceeds applied to that purpose, would bring more than sufficient to pay the amount due on the mortgage. That the sale of the mine, under such circumstances, would be an act of great injustice; his interest, as he alleges,

in the mine, representing actual cash value paid for the property, while the advances made by the company are, by the terms of their trust, to be repaid out of the profits of the mine.

No answer or reply of any kind is made to this statement of facts by any party. Indeed, the controversy is not between the plaintiff and defendants, nor between the plaintiff and the *cestui que trust*, *Belloni*. It seemed, on the argument, to be between defendants and *Belloni*, and the defendants' counsel pressed the Court strongly that *Belloni* not having been made a party to the suit by plaintiff, that he had no *locus standi*. But we thought differently, because such, it would seem, is the practice of the Equity Court that a *cestui que trust* may at any time intervene, where his interests are at stake, by petition. But if that were not so, we thought that was not an objection that could prevail now, inasmuch as it was not taken before the appeal. But the appeal was applied for and granted by the learned Judge. And by section 14 of chapter 108, *Revised Statutes*, "Of Trust and Trustees," any person entitled to apply for an order may, if he should think fit, present a petition in the first instance to the Court, &c.

I am not aware of any case reported in any of the books precisely similar to this. Under section 12, chapter 108, *Revised Statutes*, in cases of lands taken in execution, the judgment creditor may select certain portions for sale, and if he give the sheriff ten days' notice of his request to have such portions first sold, the sheriff shall govern himself accordingly. It seems but reasonable it should be so. But this is statutory, and does not extend to the case of mortgagor and mortgagee. And yet with the vast powers exercised by Equity Courts over suits and suitors, their powers of marshalling assets so that a first creditor, with no securities, may be compelled to resort to one, so as to allow a second creditor to avail himself and resort to the other, where, but for the interference of the Court, he would be hopelessly deprived of redress, I can hardly doubt that if equity to a *cestui que trust* requires it, especially if the mortgagee be not prejudiced thereby, that this Court possesses the power and would exercise it to dispose of such portions of the mortgaged property as would least injure an estate and yet completely extinguish the debt

secured thereon by mortgage. *Ex parte Kendale*, 17 Ves., 520; *Story's Eq. Pl.*, section 633.

The mortgage in the present case is one of a leasehold interest, in part at least. Three of the leases described are crown leases, so-called, and are mortgaged, together with the mills, mill machinery, tools, and machinery of all kinds used for mining and other purposes, together with "all the real and personal estate conveyed to the defendants by the *Block House Company*. And this comprehended not merely the areas as described on the surface, but the leads and seams of coal, opened or unopened, within, under, or upon all that tract of land, &c." In this respect this mortgage is somewhat peculiar. And here it is perhaps proper that I should remark that on the argument before us it appeared that some affidavit was prepared and read to His Lordship on the argument before him, by defendants' counsel, which, for some reason or other, he obtained leave subsequently to withdraw, and withdrew it. What its contents were, or why withdrawn, does not now appear.

But as the case presents itself to this Court now upon *Mr. Belloni's* petition and affidavit, which are not contradicted nor qualified in any way, it seems to me that the proper course to be pursued, consistent with equity, is to refer it to a Master to take evidence on the subject of the coals alleged to have been raised from the mine in question under an order to be drawn up for that purpose, and to return his proceedings at a short day, with the evidence and his report in the premises. The order to be so guarded as to protect the mortgagees from any detriment or damages in consequence of or caused by the delay.

COOK v. SUMNER ET AL.

A judgment by default will be set aside as a matter of course and the defendant admitted to plead where the default has been marked in consequence of a misapprehension on the part of the defendant's attorney, unless there has been unreasonable delay in making the application.

What is reasonable time must depend upon the circumstances of each particular case.

RITCHIE, E. J., delivered judgment, as follows :—

The rule *nisi* to set aside the judgment in this case, which was discharged by the learned Judge at Chambers, was obtained on the affidavits of *William H. F. Sumner* and *Mr. McDonald*, his Attorney. That of the former set forth the nature of the action; that the defendants have a good defence to it on the merits, and are not indebted to the plaintiffs; that he was served with the writ on the 1st June, which he handed to *Mr. McDonald*, with instructions to put in a defence; and that he subsequently ascertained that an execution had been placed in the sheriff's hands for the amount of the particulars claimed in the action, and costs. And *Mr. McDonald*, in his affidavit, states that the writ was placed in his hands by the defendants, with instructions to plead to it, and that, as far as the facts of the case were communicated to him, he believed they had a good defence upon the merits. He goes on to say that, being at *Truro*, on the Circuit, he applied to *Mr. Laurence*, the plaintiff's attorney, the day before the time for pleading had expired, and requested him to extend the time for a few days, as he was very busy, who at once consented. And relying on such consent, he did not then plead, and on the *Saturday* following he discovered with surprise that a default had been marked two days after his conversation with *Mr. Laurence*.

There can be no doubt, from these statements, that it was the desire of the defendants to defend the action, and that it was the intention of *Mr. McDonald* to appear and plead; and whether *Mr. Laurence* did or did not agree to give time, we can come to no other conclusion than that *Mr. McDonald*, from what took place between them, believed and acted on the belief that his request had been complied with, and that but for such compliances he would have pleaded at once, or obtained time to plead from the Judge who was presiding, at

the Court at *Truro*. And though he may not have been deceived by *Mr. Laurence*, but acted under a misapprehension, an opportunity should nevertheless be given to the defendants to put it in defence.

It is to be regretted that *Mr. Laurence* had not intimated to *Mr. McDonald* his intention of marking a default before doing so, for, though in his affidavit he says he did not promise to give the time required, and that he was not requested to do so, yet he says *Mr. McDonald* met him in front of the Court House, in *Truro*, and very hurriedly said to him that he had a writ from his office, which was pleadable to to-morrow, and instantly left him to speak to another person. And he adds: "I made no reply." From which he would have reason to infer that *Mr. McDonald* intended to appear and plead. Under these circumstances, to prevent the defendants from making a defence would work a great injustice, and in cases like the present it is almost a matter of course to set aside a judgment, though regularly entered, unless there has been unreasonable delay on the part of the defendant in making the application. See *Ch.*, 988; *Evans v. Gill*, 1 B. & P., 52, &c. And it would appear that the learned Judge who discharged the rule *nisi* did so on the ground that the application in this case was made too late.

Every application of this nature should be made in a reasonable time after the knowledge of the entry of the judgment, and what is a reasonable time must depend upon the circumstances of each particular case.

It would appear that *Mr. McDonald* became aware of the judgment by default on *Saturday*, which he says was the last day of the Court at *Truro*. *Mr. Laurence* says the Court terminated on *Friday*. If so, the discovery was not made till after the termination of the Court at *Truro*, and no application was made to the Court for a rule *nisi* to set aside the judgment during the sitting of the Court at *Amherst*, as it was indispensable to have the affidavit of one of the defendants to swear to merits, for without such an affidavit the application must have failed. See *Malone v. Duggan*, Oldright, 697. The delay which took place cannot be considered so unreasonable as to preclude the Court from interfering. And here the plaintiff has security for the amount of the judgment in case

he eventually succeeds in the action. The only terms imposed on the defendants should be the payment of the costs incurred in entering the judgment. And no costs of the argument can be given.

IN RE DONALD MATHESON, AN INSOLVENT.

THE insolvent, having determined to stop business, disposed of the stock of goods on hand to his daughter, for the sum of \$1,000, who continued the business for the benefit of the family, the insolvent assisting as clerk. No money was paid by the daughter for the goods at the time of purchase, or subsequently, nor was any security taken, but at the time of the assignment, about a year after, the insolvent handed to the assignee a note of one A. for the sum of \$1,000, which was never paid. It was admitted by the insolvent that after he ceased to do business he collected debts due him, and lived upon them, and paid nothing to his creditors. No inventory was taken or valuation made of the goods at the time of the sale, but the insolvent said that the sum of \$1,000 was about their value. The Judge of Probate having granted a discharge with a first-class certificate, from which the creditors appealed,

Held, that, though the insolvent might not have deprived himself of all right to a discharge, under the circumstances, it should be of the second class, and suspended for the period of two years.

RITCHIE, J., delivered judgment as follows :—

On the 27th September, 1871, the insolvent made an assignment under the *Insolvent Act*.

The account he gives of his affairs is that the losses which led to his insolvency occurred as far back as 1866 and 1867. He had used capital to the extent of \$1,000 obtained through his wife, who had property left her by her father, *Mr. Bissett*, free from the control of her husband. That he stopped business when he found his means not equal to carrying it on. His creditors, he says, were informed of the state of his business, and they encouraged him to continue it.

In the autumn of 1870 he came to the conclusion to stop. He had in that year taken up a further supply of goods, but found at the end of the season that he could not meet his bills. He had then a stock of goods on hand, and he disposed of the whole of them to his daughter, who continued the business for the benefit of the insolvent's family, including herself, the insolvent assisting her as clerk. No money was paid by the daughter for the goods at the time she obtained them from her father, or since. He says he sold them to her for \$1,000, and they were worth *about that sum*. And when he made his assignment, about a year after, he handed to the

assignes a note for \$1,000, made by a *Mr. Archibald*, which has never yet been paid. This, he said, was for the goods so sold. The insolvent admits that after he ceased to do business, in 1870, he collected debts due him and lived on them, and does not pretend that he made any payments to his creditors.

Some time before this he gave a deed of all his real estate in trust for the benefit of his wife and children, to secure to them the payment of the money he had used belonging to them. The house in which he lives is one of the properties comprised in that deed, the consideration of which is stated to be \$10,344.

On the account thus given by the insolvent, the Judge of Probate has granted him a discharge, with a first-class certificate, and from his decree the creditors have appealed.

The insolvent would, I think, have stood in a better position before the Court if he had made an assignment under the *Insolvent Act* as soon as he found himself unable to meet his liabilities, at latest in the autumn of 1870, and had handed over all the property he then owned for the benefit of his creditors. Assuming the statement of the insolvent to be true, there may have been no legal objection to the conveyance of the real estate, taking place, as he alleges, before the passing of the *Insolvent Act* of 1869, to secure a debt actually due, though his evidence regarding this property and the debt to his family is very vague and unsatisfactory, and I may add that the same observation is applicable to the account he gives of his affairs generally. But whatever may be thought of his conduct with respect to his real estate, no sanction should, I think, be given to the course he pursued with respect to the remainder of his property. To allow a debtor to dispose of his whole stock in trade to his daughter, living with him, without an inventory or valuation, as in this case, for \$1,000, which the insolvent says was *about* its value, no money paid, or security taken, the business conducted, as before, by the daughter, the father acting as clerk, and the proceeds going towards the support of the father's family, just as it had done previous to the transfer, would be fraught with the worst consequences.

After the lapse of a year from the time he assigned his stock in trade, the insolvent takes advantage of an amendment

of the *Insolvent Act*, and assigns what happens to remain of his property, and then hands over to the assignee the note of a son-in-law named *Archibald*, for \$1,000, as representing the value of the goods sold to his daughter, who is not shewn to have been in any way connected with the transaction. The insolvent, in the meantime, having collected debts due him in his former business, which, according to his own account, he appropriated to his own use, instead of paying to his creditors, he may not have deprived himself of all right to a discharge, but he does not appear before the Court in so favorable a light as to entitle him to a first-class certificate.

I am of opinion, under all the circumstances of this case, that the discharge should be of the second class, and that it should be suspended for a period of two years.

THE QUEEN v. DEBAY.

THE defendant's husband having deserted her for a period of upwards of seven years, and defendant having contracted a second marriage. On an indictment for bigamy,

Held, that it was incumbent upon the prosecution to shew knowledge on the part of the defendant of the fact that her husband was living, and that in the absence of such proof the conviction could not be sustained.

RITCHIE, J., delivered judgment, as follows:—

The question submitted for the opinion of the Court by the learned Judge before whom the prisoner was tried is whether he had rightly instructed the jury that the evidence adduced on the trial of the prisoner, who was indicted for bigamy, in marrying one *George Carr*, in the lifetime of her husband, *William Debay*, did not raise any presumption of the death of *Debay*, and that the prisoner was not aware, when she married *Carr*, that *Debay* was living.

On the part of the prosecution *Debay* was proved to have been seen in the *United States* after the second marriage, about three weeks before the trial. And on the part of the defence, that eight years ago the prisoner and her husband separated, he having turned her out of doors, and she never lived with him since. And the witness says that as far as she knew he had been absent from that time till the prosecution she, (the witness,) having never seen him.

The section of the *Dominion Statute* under which the prisoner was indicted provides that nothing therein contained shall extend to any person marrying a second time whose husband or wife has been continually absent from such person for the space of seven years then last past, and was not known by such person to be living within that time.

The absence contemplated by the statute is not necessarily an absence from the country. It is sufficient for the prisoner to prove the absence of *Debay* from her; such an absence as would lead to the inference that she did not know of his residence, and whether he was alive or dead. An absence of this character was, I think, shewn in the present case; at any rate, such evidence was adduced as would have been put to the jury, and from which they certainly might have found such an absence.

But, assuming the absence of *Debay* for seven years previous to the second marriage to have been proved, is there any evidence to shew that the prisoner knew of his being alive during that period? I confess I can see none whatever. If, indeed, it had been incumbent on the prisoner to establish the fact of her ignorance of his existence, she has failed to do so. And the learned Judge was correct in his charge to the jury in this particular, and the conviction would be right, notwithstanding the proof of absence for the prescribed period, but I apprehend that knowledge of the husband being alive must be brought home to the prisoner by the prosecutor. And this not having been done, the jury should have been told to acquit the prisoner.

The English statute and that of the Dominion on the subject of bigamy are similar, and there are several English decisions bearing on these questions. In that of *Reg. v. Jones*, the prisoner's wife had been absent about sixteen or seventeen years, and was living seventeen or eighteen miles away from him, and the only evidence on the subject was that of the second wife, that she never knew or heard of a first wife. *Creswell, J.*, said: "I think the prisoner must be acquitted. There is no proof that he, a man in service, knew that his first wife was living, and in the absence of that proof, I think he comes within the provisions of the statute." See also *Nepean v. Knight*, 2 M. & W., 912.

These cases were cited on the argument, but there is a later case, to which our attention was not directed, and that seems authoritatively to settle the question upon which of the parties the proof of *scienter* is thrown. I refer to *The Queen v. Curgerwen*, L. R., 1 Crown Cases Reserved, 1. Mr. Justice *Willes* there submitted for the opinion of the Judges whether the burden of proof of the prisoner's knowledge of his first wife being alive rested on him, as he considered the case had been left undecided in *Reg. v. Briggs*, Dears & Bell, C. C., 98. *Pollock*, C. B., gave this opinion of himself, and the other Judges present, *Willes*, J., *Pigott*, B., *Shea* and *Montague Smith*, J. J.: "This question," he said, "has arisen more than once, and we are now asked to settle the law on the subject. The term, 'burden of proof' is an inconvenient one, except when a person is called on to prove an affirmative. Our attention has been called to a note by the editor of *Russell on Crimes*, known as a gentleman of great learning, ability, and research, who appears to have adopted the view that the burden of proof lies upon the prisoner. We think, however, that it is contrary to the general spirit of the English law that the prisoner should be called on to prove a negative, and that it is better and more in agreement with the general doctrine and principles of our criminal law to adopt the rule laid down by *Wightman*, J., in *Reg. v. Heaton*, 3 Fos. & Fin., 819."

It was suggested on the argument that though knowledge by the prisoner was not distinctly proved, it might be inferred from the fact in evidence, but if such were the case, it was then a question to be left to the jury. I can, however, see nothing to lead to such an inference, and the jury would have to be asked, in the absence of actual proof, to assume that the prisoner had committed the crime of bigamy, where the presumption of law is always against the commission of a crime.

It was in consequence of the doubts felt by the learned Judge who tried the case that it has been submitted for our opinion, and we all concur in thinking that the conviction cannot be sustained.

TUPPER v. CAMPBELL.

On a rule to set aside a capias and cancel the bail bond, the defendant swore that he had no intention of leaving the province until after the determination of the suit, and then only for a short time, and with the intention of returning. It appeared, on the other hand, that the defendant had stated his intention of leaving the province, and had disposed of all his property, with the exception of a portion of a farm of little value, and was residing at the house of a brother, having no home of his own.

The rule was discharged.

RITCHIE, E. J., delivered judgment, as follows:—

A capias issued in this case on the affidavit of the plaintiff that the defendant was about to leave the province, as he had probable cause for believing, and did believe, and that he feared that the damages he had sustained would be lost unless the defendant were arrested.

The defendant, having given bail to the sheriff, obtained a rule *nisi* to set aside the capias and have the bail bond cancelled on an affidavit made by him that he was not at the time of the issue of the capias, nor since, and is not now, about to leave the province, except as thereafter mentioned. That he intended, and had partly expressed his intention of visiting the *United States*, where he had friends and relatives, *after the trial of this suit*, and that he never intended to leave the province *until the trial thereof should take place*, and then entirely *with the intention of returning*; and that he informed the plaintiff's brother, *Eliakim Tupper*, that he intended to make such visit, and that he never expressed any intention of *permanently leaving*, except as aforesaid. That he owns a farm in *Smithfield*, and has notes and debts outstanding to a large amount, and will have plenty of property to respond any judgment that could possibly be obtained against him.

The plaintiff, in shewing cause against this rule in his affidavit, states that after the commencement of this action the defendant sold the farm on which he resided, at *Upper Stewjacks*, and removed therefrom with his family, and in *May* last sold all his farming utensils, stock of cattle, horses, sheep, and other personal property, with some trifling exceptions, and that when the capias issued the farm had been sold, and the personal property advertised for sale, and

defendant had frequently expressed his intention to go to the *United States* in a very short time. That the defendant, to the best of plaintiff's knowledge and belief, owns no other property, except a small portion of a farm at *Smithfield*, which must be the one referred to by defendant in his affidavit. That it contained originally about two hundred and fifty acres, of which he now only owns fifty acres, which are of not more value at the utmost than \$100. That there is no house or barn on it, and the cultivated portion is very limited. And he believes and has no doubt that the defendant intends to leave this country, with his family, permanently to reside in the *United States*.

The affidavit of *Eliakim Tupper* corroborates the statements of the plaintiff, and he adds that the defendant told him, when executing the deed of his farm, that he intended to go to the *United States*, and that since the sale of his personal property his family have resided in his brother's house, and that he lately had a conversation with him, in which he stated that he was going to *Tennessee*, in the *United States*, with the intention of looking out for a place for himself and his family to reside on, as he understood. And he also states his belief that it is the intention of defendant to leave the province, and remain permanently absent therefrom, and that he will do so if the rule is made absolute.

The plaintiff, when he obtained the *capias*, had good grounds for believing that the defendant intended to leave the province, and it does not follow that the defendant is to have the *capias* set aside and the bail bond cancelled on his affidavit that he had no intention of leaving. And the defendant does not say he has no such intention. He merely says that he does not intend to leave till this cause is tried, and that he intends to return; he does not say when, nor does he say to remain. And again he says he never expressed any intention of permanently leaving, except as aforesaid. He is silent as to the sale of his farm and personal property since the commencement of this action; and though he speaks of owning a farm at *Smithfield*, it turns out to be fifty acres of land of little value, without house or barn on it, while he is at present without a home here, and his family are residing at the house of a brother.

These circumstances, leading to the inference of an intention to leave, coupled with his own admitted declarations, should have been referred to and explained by the defendant. And I cannot but infer, from the statements on both sides, that he does intend to leave the province and reside in the *United States*, and I do not think that the defendant's present application should be granted, even though he may not intend to leave till he knows the result of this action, and though he may intend to return and remain a short time in the province.

In *Duncan v. Jacobs*, 1 Fisher's Dig., 362, it was decided that where sufficient had been shewn to indicate that defendant had an intention of quitting *England*, the Court will not discharge him, even though he swears he never contemplated leaving *England*, and most positively not for the place alleged in the affidavit on which he was held to bail. And in *Walker v. Lamb*, 9 Dowl., 134, *Patterson, J.*, said: "I am far from saying that the defendant should be capable of discharging himself by merely swearing that he has no intention to go abroad. I do not mean to say that that is sufficient, as if it were so it would frustrate the object of the act of parliament." And in one 1 *Chitty's Archbold*, 796, where an application is made on the ground that it was not the intention of the defendant to leave *England*, he should *shew facts* negating such intention in his affidavit. He should *shew*, that is, make it to appear that he was not about to quit *England*.

I am of opinion the rule must be discharged.

LAYTON v. MOLEAN.

PLAINTIFF sought to set aside an award made in the defendant's favor on three grounds, (1.) Misconduct on the part of the arbitrator. (2.) Refusal to receive evidence for the plaintiff, and (3) the examination of a witness for the defence in the plaintiff's absence. The Court being of the opinion that plaintiff had entirely failed on all his grounds, the rule to set aside the award was discharged with costs.

DESBARRES, J., now, (August 15th, 1874,) delivered judgment, as follows:—

In this case a rule *nisi* was granted in August, 1873, to set aside the award made in favor of defendant by Mr.

Oldright, to whom all matters in difference therein were referred under a rule of this Court. The suit, it appears, was brought for rent of a house and premises at *Amherst*, belonging to plaintiff, and damages or double rent for holding the premises beyond the period of the tenancy. Also, for not keeping the premises in repair, and for turning a stream of water into the plaintiff's garden, and into and against the wall of the house, whereby the garden and wall were injured, &c.

The rule for setting aside the award was granted on two affidavits, one made by the plaintiff and the other by his attorney, *Mr. Charles J. Townshend*; by the first of which the plaintiff, among other things, charges the arbitrator with irregular and improper conduct in conducting the arbitration and making up his award, by going to the house of, and receiving and hearing the evidence of *Bayard Dodge*, relating to the matters in dispute in the cause, in the absence of plaintiff, or of any person on his behalf. Also, with declining to receive the evidence of an important witness for plaintiff, named *Embree*, whose testimony the plaintiff states he had reason to believe would or should have influenced the decision of the arbitrator. Also alleging that the award was not final and conclusive in reference to all the matters referred to the arbitrator, inasmuch as it did not award concerning certain matters specially referred to him by the mutual agreement of the parties *at the time of the hearing*, relating to a claim made by defendant on plaintiff for damages, which it was agreed should be referred to the arbitrator, together with the matters sued for in this suit, and that the arbitrator should make an award as well concerning the matters in respect of which the action was brought as upon the defendant's counter claim for damages against the plaintiff. That the arbitrator heard the evidence in respect of defendant's claim for damages, all of which was irregular and improper on the part of the arbitrator, unless he intended to make an award concerning the same, but that the arbitrator made no award whatever concerning such claim, and left the plaintiff liable to be prosecuted in respect of it. That this evidence must necessarily have materially influenced the mind and judgment of the arbitrator in making his award, and that the plaintiff believed the award he made was in gross violation of the evidence adduced before him.

The affidavit of *Mr. Townshend* states that he verily believed the award to be unjust, illegal, and contrary to a large mass of uncontradicted evidence adduced by the plaintiff, who substantiated clearly all the several allegations in his declaration, and that the award was so grossly opposed to the approved facts as to exhibit undue bias and partiality on the part of the arbitrator in making it. That he clearly and distinctly pointed out to the arbitrator the fact that on defendant's own pleadings he was indebted to plaintiff in \$4. That the arbitrator was guilty of irregular and improper conduct in conducting the arbitration, and in making up his award by receiving the evidence of *Bayard Dodge*, as detailed in plaintiff's affidavit, which he, (*Mr. Townshend*,) had read over and declared to be correct on the facts therein stated. That the arbitrator informed the plaintiff and himself that he intended viewing the premises in dispute with *Bayard Dodge*, and requested both parties to be present, but that the arbitrator did not intimate, nor did he, (*Mr. Townshend*,) know that the arbitrator intended to examine *Bayard Dodge* without the parties or their counsel being present to examine him. That the arbitrator declined to receive the evidence of *Elisha Embree*, an important witness on behalf of plaintiff, whose evidence would have been material on his behalf, and that being misled by certain expressions of the arbitrator on one branch of the case, he did not produce witnesses before him in reference thereto. That the award is not final in reference to all the matters submitted to the arbitrator, and that no award having been made at all in reference to a counter claim for damages set up against the plaintiff after a clear and express agreement was made and entered into between both parties and their counsel, that the whole claim of defendant for damages, as well as those sued for by plaintiff, should be arbitrated and decided upon by him. That he (*Mr. Townshend*,) would not have consented that the arbitrator should hear the evidence in respect of defendant's claim for damages if he had not supposed such claim would have been arbitrated upon, but that as the award now stands, the plaintiff is still liable to be sued by defendant for those very matters which were then referred to him. That no award having been made in respect to plaintiff's claim for damages, and the money.

paid into Court by defendant having been paid solely for rent admitted to be due by him, the award could not be pleaded in answer to any action brought for recovery of said damages. Lastly, that it was proved and not denied that defendant overheld the house and premises mentioned in the writ, and yet no damages, rent, or compensation was allowed by the arbitrator for such overholding.

Some of these charges are of a grave character, and, if unanswered, would doubtless be sufficient to invalidate the award. Others are not important, but the whole of them have been met and answered by the other side in a way that, to my mind, fully exonerates the arbitrator from the imputation of misconduct and partiality attributed to him in conducting the arbitration, shewing that, so far from acting improperly, his conduct throughout the whole inquiry was marked by fairness and impartiality to both parties. The defendant says that the award made in the cause is not and was not made in opposition to uncontradicted evidence, nor was it at variance with the facts of the case as proved, nor nor does he believe that the arbitrator was biased in his favor, nor did he exhibit at any time any partiality towards him, but, on the contrary, during the whole period of the arbitration strictly abstained from expressing, even by implication, any opinion upon the merits of the case, and his whole conduct was marked by the strictest impartiality and fairness. That it is utterly false and untrue that *Charles J. Townshend*, Esquire, pointed out to the arbitrator that he, (defendant,) was clearly indebted as regards the rent to plaintiff in the sum of \$4, and that the arbitrator admitted the correctness of such statement when so pointed out to him, and positively declares that the arbitrator, during the whole investigation, abstained from expressing any opinion on any matter in the whole case. He says it is quite true he did not set up a claim during the investigation of this cause before the arbitrator for the plaintiff interfering with him while he had the premises rented of him and held as tenant, on account of his breaking open his gate, using the lane, and taking partial possession of the barn, but *Mr. Townshend* objected to the claim being set up, or the evidence being introduced on the arbitration, and after a long altercation, it was finally

agreed that the arbitrator should hear the evidence upon the claim set up and *consider it or not, as he pleased*. But he distinctly and positively states that it never was agreed that it should be especially referred to the arbitrator, to be specially mentioned in his award. This never was done or agreed to, but merely that he should hear the evidence, *and then consider it or not, as he pleased*. That the aspersions of partiality and misconduct cast upon the arbitrator by plaintiff and his attorney *are untrue and unjust*, and not warranted by the demeanor and conduct of the arbitrator. That he saw nothing, by act, conduct, or deed of the arbitrator, that would justify the charge of partiality alleged against him.

Mr. W. A. Morse says that he has no hesitation in stating that the charge of partiality and misconduct made *by plaintiff and Mr. Townshend, his attorney*, against the arbitrator is *wholly false and untrue*. That during the period of the arbitration the arbitrator carefully abstained from expressing any opinion upon the merits of the case either way; *never declined to receive evidence that was tendered, but on the contrary, exhibited the utmost patience* during a long investigation, in which a great deal of altercation took place between the plaintiff's attorney and himself, and conducted himself during the whole period with the strictest impartiality and fairness. *That the arbitrator never declined or refused to receive the evidence of one Elisha Embree*. Mr. Townshend offered to produce him as a witness, stating that he intended to prove by him that defendant had once been his tenant, and had left his premises in a bad condition. The arbitrator merely asked Mr. Townshend if he thought such evidence relative to the issue in this cause, and Mr. Townshend did not insist upon having the witness or his testimony heard. That with respect to the counter claim for damages set up by defendant, it was agreed, after a long altercation between plaintiff's attorney and himself, that the arbitrator should hear the testimony on it, *and either consider it or reject it, just as he chose, but it never was stipulated or mentioned* that it should be specially referred to him, with a view of being specially mentioned in the award in this cause; on the contrary, no such arrangement was ever made. That with regard to Mr. Dodge, he was merely permitted, by the

concurrence of both *Mr. Townshend* and himself, and at the request of the arbitrator to be allowed to accompany him to ascertain the amount of damage done, as a master carpenter, after all or nearly all the proof of damage had been given, and that he went with the arbitrator to examine the premises, with both plaintiff and defendant, as the arbitrator informed both *Mr. Townshend* and himself after the examination took place, and that in justice to the arbitrator he felt himself obliged to state that the allegations contained in the affidavit of plaintiff and his attorney of bias and misconduct on the part of the arbitrator are most unjust and untrue, and quite uncalled for by the conduct or demeanor of the arbitrator during the whole investigation.

Bayard Dodge states that the arbitrator called upon him, during the pendency of the arbitration, to go with him and examine the premises, with the view of finding out, as he stated, the real amount of damage done the premises. That he at first declined to go with him, but on his stating that *Mr. Morse* and *Mr. Townshend* had consented to his going, he then went and examined the premises, with the greatest care, and found no damage beyond the reasonable wear and tear, and that he could not, nor could the said arbitrator, after allowing for reasonable wear and tear, find any amount wherewith to charge the defendant, and both plaintiff and defendant were with the arbitrator and himself when they examined the premises. That he was in *Amherst*, and could have been called as a witness, and examined by either party, had they wished to do so, and adds that it is quite false and untrue that the arbitrator went to his house and heard and received his testimony relative to the matters in dispute,—such is not and was not the case.

It will be perceived there are three grounds on which the award of the arbitrator is sought to be set aside. First, the misconduct of the arbitrator. Second, the refusal of the arbitrator to receive evidence for the plaintiff. Third, the examination of a witness for the defence in the absence of the plaintiff. The plaintiff having entirely failed to establish either of these grounds, we are of opinion that the rule nisi for setting aside the award must be discharged with costs.

McDONALD v. GELDERT.

Plaintiff made an oral agreement with G., the owner of a gold claim, to work a portion of the claim, plaintiff receiving two-thirds of the profits after paying all expenses. Defendant, acting as Sheriff of the County of Hants, levied upon and sold certain gold taken out of the mine by plaintiff on an execution against G. Plaintiff having brought trover for the gold so taken, and a verdict having passed in his favor.

Held, (1.) That under the agreement to work the mine for a share of the profits, no interest in the mine was transferred to plaintiff within the meaning of section four of the Statute of Frauds.

(2.) That the sheriff should have sold only the execution debtors share, leaving the purchaser to settle with the plaintiff.

(3.) That though the verdict for plaintiff might be set aside and a new trial ordered, it not appearing that defendant by the sale put it out of the plaintiff's power to take the property, or pursue his remedy against the purchaser, yet the plaintiff having an undoubted right to a share, if not the whole of the gold, under the equitable powers of the Court, it ought to be referred to a Master to ascertain the agreement between plaintiff and G., take an account of the expenses of working the mine, &c., and report the balance if any, which was due by the plaintiff to G. at the time of the levy. The question of costs to be decided after the making of the Master's report.

McDONALD, J., now, (December 8th, 1874,) delivered judgment, as follows:—

The plaintiff in this case in 1870 made an oral agreement with one *Charles Gay*, who owned a free gold claim at *Renfrew*, that he, the plaintiff, would work that part of the mine called the *Bayne* shaft for two-thirds of the profits after paying expenses. The agreement was to continue in force for four weeks, or until *Gay* would return home after some absence in the *United States*, whither he was about to proceed. The plaintiff was to make all the advances and bear all the losses, if any, attending the work. During the time the agreement was in force the plaintiff worked the mine, took gold out of the quartz, and had it in amalgam, when the plaintiff, as Sheriff of the County of *Hants*, seized it under an execution against *Gay*, and had it rendered into pure gold and sold. Upon this the plaintiff brought trover for, among other things, fifty ingots of gold, fifty ingots of gold amalgam.

The defendant pleaded, first, that he did not convert, &c. Second, that the property was not that of the plaintiff, and third and fourth, a justification for the seizing and taking, under an execution against *Gay*, alleging the property to be that of the latter. At the trial no evidence of a sale was given, nor did the defendant's pleas of justification admit such sale. But, at the argument, the sale of all the gold seized was

admitted, and the execution, with the sheriff's return endorsed, was produced by the learned counsel for the defendant, shewing that the gold, (17 oz., 8 dwt.,) was sold for \$313.20.

At the trial a verdict was taken by consent for the plaintiff for that amount and interest, subject to the opinion of the Court upon the question whether, under the facts, the action could be maintained under the *Statute of Frauds*, and of the doubt, as intimated by the learned Judge who tried the cause, that the evidence then produced established the fact of a conversion, so as to enable the plaintiff to recover. The defendant contends that, under the *Statute of Frauds*, no property passed to the plaintiff, and that, even if he had an interest, it was only that of a part owner, and that the sheriff was justified in seizing and selling the whole property to satisfy an execution against a co-partner. It does not appear, nor is it contended, that *Gay* was the owner of the soil covering the mine, and no doubt his right to the mine was under a different title from that of proprietor of the land.

The plaintiff did not bring this action for injuries to the mine, nor does he claim any interest in it. What he does claim is that, by the agreement between him and *Gay*, in consideration that he should do work, expend money, and run risks in endeavoring to get gold out of the mine of the latter, he should have a certain interest in the gold so found, when it should be severed from the mine and become distinct property.

In order to give one an interest in the profits of a business it is not necessary that he should have any legal title to, or interest in the property, stock, or capital out of which the profits are to be made. It was so held in the case of *Smith v. Watson*, 2 B. & C., 401, where a broker purchased whalebone for another, and in lieu of brokerage was to receive a certain proportion of the profits, and bear a proportion of the losses. In that case the question was whether the broker had an interest in the property out of which the profits were to be made. In this case it is whether plaintiff had an interest in the profits themselves, (when so made,) which was the gold found. And in both cases the same principle applies. Also in *Meyer v. Sharpe*, 5 Taunt., 74, it was held that a person who is paid by a proprietor of the profits of an adventure is

not necessarily a partner in the goods out of which the profits were to be made. In that case, *Gibbs, J.*, delivering judgment, said: "I think it clear that the intention of the parties was, not that *Krehmer & Co.* should have any interest in the goods themselves, but that they should be interested in the profits of the concern only." So in this case it is clear that the intention of the parties was, not that the plaintiff should have an interest in the mines out of which the profits were to be made, but in the profits themselves when so made, and as there was no agreement nor intention to agree for any interest in or concerning lands, the *Statute of Frauds* does not, in my opinion, apply. In *Evans v. Roberts*, 5 B. & C., 829, a verbal agreement was made, on the 25th of *September*, for the sale of a then growing crop of potatoes. Held, not to be a sale within the *Statute of Frauds*. *Holroyd, J.*, said that "the contract being for the sale of the produce of a certain quantity of land, was a contract to render what afterwards would become a chattel, and although some advantage might accrue to the vendee by the potatoes remaining in the land, I think that was not an interest in or concerning land within the meaning of the 4th section of the *Statute of Frauds*." *Littledale, J.*, said: "I am of opinion that a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of lands, tenements, or hereditaments, or any interest in or concerning the same within the meaning of the 4th section of the *Statute of Frauds*." The case of *Jones v. Flint*, 10 Ad. & El., p. 753, also shews that where it is not the intention of the parties to contract for any interest in the land, the *Statute of Frauds* does not apply. There the plaintiff and defendant orally agreed, (in *August*,) that the defendant should pay £45 for the crop of corn on the plaintiff's land and the profits of the stubble. That the plaintiff was to have liberty for his cattle to run with the defendant's, and that the defendant was also to have some potatoes growing on the land, and whatever hay grass was in the field. Defendant was to harvest the corn and dig up the potatoes, and the plaintiff was to pay the tithes. It was held to be a sale of goods and chattels. Lord *Denman*, pointing out the difference between this and the case of *Roberts v. Evans*, said that, in the

one case, the potatoes were to be dug by the seller, in the other by the purchaser ; but quotes from the judgment of Mr. Justice *Holroyd*, who said : " In this case the potatoes are not to be dug by the buyer, but even if that had been part of the agreement, I think it would not have been an interest in the land, but a mere easement."

If, then, I am correct, as I think I am, in saying that the *Statute of Frauds* does not apply in this case, and that the plaintiff and *Gay* were really partners in the gold seized, the remaining questions are whether trover will lie under the evidence ; and how far in either case, in view of all the facts now before us, the Court should exercise an equitable jurisdiction between the parties.

In *Johnson v. Evans*, 7 M. & G., 240, *Tindal*, C. J., said : " It is an admitted general rule of law that the judgment creditor of any partner may take an execution against the partner, as well his separate property as his share or interest in all the personal property of the partnership that is tangible and capable of being seized. And it is undoubtedly true that in order to make, and for the purpose of making the execution effectual against the share of the debtor, partner in the joint property, the sheriff must seize the whole, the shares of the two partners being undivided." But he says that such taking possession does not convey any interest or property whatever in the other part owner's share. The case of *Mayhew* and another, assignees of *Mayhew*, v. *Herrick*, 7 M. G. & S., 230, is important here, as it is there held that, although a sale by a sheriff of the property of partners, under an execution against one of them, does not, under the circumstances of that case, amount to a conversion for which trover would lie, yet such a sale under other circumstances may be treated as a conversion, as where the Sheriff puts it out of the power of the co-partner of the debtor to take the property or pursue his remedy against the party who got the possession of it. In that case a verdict in favor of the plaintiff for his share of the profits was sustained by the Court, as the declaration, in addition to a count in trover, contained a count setting forth the facts specially,—as proved at the trial.

In this cause there was no evidence at the trial that the sheriff sold the gold, and, as the case then stood, a verdict for

the plaintiff could not be upheld, the sheriff having the undoubted right to *seize* the whole co-partnership property under an execution against one of the partners. We have now, however, the admission that he sold it all, but what the respective interests of the partners in the proceeds are does not appear,—there being no evidence of the expense of working the mine, which, under the agreement, must be deducted before a division of the profits can be made. In strictness the sheriff should have sold but the interest of *Gay*, whatever that might have been, leaving the purchaser to settle with *McDonald*. *Archbold's Practice*, 12th edition, 659. But it does not appear that he so conducted himself as to put it out of the power of the plaintiff to take the property, or to pursue his remedy against the purchaser; and therefore, under the authority of the case just cited, the verdict *might* be set aside, and a new trial granted.

In the case of *Eddie v. Davidson*, 2 Douglas, 250, it was held that if, on an execution against one of two partners, the partnership goods are taken and sold by the sheriff, he is to pay over to the other partner his share of the proceeds. And it was referred to a Master to take an account. That decision, it is true, was subsequently questioned; but, considering the large equity powers of this Court, I do not think that such a course can be open to exception here.

There have been already two trials of this cause, and the plaintiff having an undoubted right to a share, if not the whole of the proceeds of the gold, it would seem to be unnecessary, without further enquiry to incur the expense of a third trial when justice can be done in a more expeditious and less expensive way. I think it ought to be referred to a Master to ascertain the agreement between the plaintiff and *Gay*, to take an account of the expense of working the mine under it, of the sums paid or advanced by the former to the latter, the value of the gold yielded by the mine under the agreement, and the sheriff's fees on the execution, and to report the balance, if any, which was due by the plaintiff to *Gay* at the time of the levy; the question of costs to be decided after the Master shall report.

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Held, that the issue was properly withheld. The Judge who tried the case was not at liberty to admit any evidence to impeach the validity of the letters of administration. If defendant wished to attack the letters of administration, his proper course was by appeal within the time prescribed in the statute.

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Plaintiff sued for damages for an assault, and for wrongful interference with his rights as a pew-holder in the church.

The jury found a verdict against M. only and acquitted H., and M. moved to set the verdict aside.

Held, WILKINS, J., *dissentiente*, that M. had been guilty both of a "disturbance in the church" and of an assault, and that the verdict should stand.

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Where the act required notice of an assignment to be "served on the party to be sued or left at his last place of abode,"

Held, where the debtor was an attorney, that a notice served upon him by leaving it at his office instead of, in the exact words of the act, "at his last place of abode" was within the spirit of the act.

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M. Brothers, prior to making an assignment under the Insolvent Act, transferred certain policies of insurance to the plaintiff, to whom they were largely indebted for advances. The assignee having claimed the insurance, the insurers applied for and obtained an interpleader.

Held, that though policies are usually assigned in writing, a mere verbal assignment with delivery gives the assignee an equitable right to the proceeds.

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Plaintiff was entrusted with the possession of certain goods by the owner, who was about to leave the Province, to be forwarded to him. With this intention the goods were sent to a wharf to be shipped by a vessel then lying there, but there was no formal delivery to the master or any one on board. The defendant, who shewed no justification, caused the goods to be taken and sold.

Held, that until the assent of the master of the vessel to receive the goods was shewn, they remained in the possession of the plaintiff as special owner, so as to enable him to maintain an action against a wrong-doer.

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BAIL-PIECE.

Application was made to set aside a bail-piece entered into on behalf of defendants on an appeal, upon the grounds ;

First : that one of the bail was a defendant in the action.

Second : that he was a barrister and attorney of the Court.

Third : that neither of the bail had justified in an amount double the amount of the verdict.

Held, as to the first objection, that the fact of one of the bail being a stock-holder in the defendant company did not incapacitate him from becoming bail. As to the second, that not having practised for nearly half-a-century, the objection did not apply, and, lastly, that the third objection could be cured by amendment which the Court had power to grant.

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1. Plaintiff brought replevin against defendant, a sheriff, for goods taken on execution, but claimed by plaintiff under a registered bill of sale from the party against whom the execution issued, and who was suffered to remain in possession. The principal question on the trial was the *bona fides* of the bill of sale, and, the jury having found for the plaintiff,

Held, notwithstanding suspicious circumstances, that their verdict could not be set aside. *Also*, that the plaintiff who had had a symbolic delivery, and had a right to immediate possession, had sufficient possession to maintain the action.

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Held, that defendant had a right to retain the property, at all events until he was paid.

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Plaintiff, a passenger from Halifax to Portland by one of defendant Co.'s steamers, sued for the value of her trunk, which she alleged had been placed in the hands of the Co.'s servants and a check given her therefor. Defendants denied receipt of the trunk, and gave evidence that plaintiff had received the check, not from them, but from the cabman who had driven her to the wharf. At the trial the learned Judge was inclined to grant a motion for a non-suit, but consented to hear defendant's evidence, and take a verdict subject to the opinion of the Court, whereupon a verdict was rendered by consent for plaintiff for the full amount claimed. The question was purely one of fact, the only point of law involved being as to whether the plaintiff ought not to have been non-suited.

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1. Where every material fact in the affidavit upon which a *certiorari* was founded was negatived in the affidavit of the other side,

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Where the grounds of an appeal from an assessment are simply matters of detail the appeal should be primarily to the Court of Sessions and not to the Supreme Court.

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C. P. obtained a piano from P. & S. on hire, with the privilege of purchasing it for \$350, by paying certain instalments within a certain time. Among other conditions of a written agreement entered into by C. P. at the time of receiving the piano were, that it should remain the property of P. & S. until fully paid for, that in default of any instalment they might resume possession without previous demand, and that C. P. should pay interest upon the purchase money at 7 per cent. C. P. paid only two instalments amounting to \$150, and then became insolvent. On P. & S. claiming the piano they were opposed by H. L., a creditor of C. P., who claimed under an assignment made to him by C. P., as security for his debt, and received by him without any knowledge of the agreement with P. & S. This assignment was duly filed and registered. The Judge in Insolvency decided against the claim of P. & S. upon the grounds,—that the agreement with them was void for usury, interest at 7 per cent. being provided for; that having left the piano in C. P.'s possession after the time for his paying for it had expired, they could not set up their claim against a *bona fide* purchaser, and that their agreement should have been filed and registered. On appeal to the Supreme Court,

Held, That the Usury statute did not apply at all, as it was not the case of a loan but a conditional sale; that the claim of P & S. was not prejudiced by their not having taken back the piano as soon as the time was up; that C. P.'s agreement with them not being in the nature of a bill of sale did not require to be registered, and that P. & S. should have the piano on paying to H. L. the amount they had received on its account from C. P.

When obtaining the rule *nisi* from the Judge in Insolvency P & S. did not produce the original agreement of C. P. with them

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CONTRACT.

Defendants had dealt with H. & Co. for some time, not knowing them to be agents for plaintiff, but considering them as principals, the bills rendered to them by H. & Co., being always in their own name. Having purchased a quantity of plaintiff's goods from H. & Co., a bill was rendered to them in H. & Co.'s name but subsequently another bill was sent in the name of plaintiff. H. & Co. became insolvent after delivery of the goods, and defendants did not pay them for them, as they had a contra account. On being sued by plaintiff they pleaded the contra account, and paid the difference into Court.

The evidence at the trial was very contradictory and conflicting, but the jury found for defendants.

Held, That the verdict should not be disturbed, and that the payment into Court was no admission of defendants' liability beyond the amount paid in.

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2. Action upon a special contract in the nature of a guarantee, alleging "that defendant gave a special promise, and made a special agreement to pay the plaintiff the amount due from one D. McL., the father of defendant." Defendant demurred, because, among other grounds, "the consideration for making or giving the special promise or agreement was not set forth in either count of plaintiff's declaration."

Held, That there should be judgment for the defendant upon the demurrer.

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3. Plaintiff was sub-contractor to defendant, who was engaged in the erection of a large building. Defendant was under agreement with the owner of the building to have it finished within a certain time or to pay a penalty for each week thereafter, and when contracting with plaintiff it was agreed upon between them that if the penalty should be incurred through the dilatoriness of the plaintiff, the amount of the penalty should be deducted from the sum to be paid by defendant to plaintiff under the sub-contract. The completion of the building was delayed for several weeks, and the defendant, alleging that this was the fault of the plaintiff, withheld the amount of the penalty when settling up with him, and upon being sued therefor pleaded that fact, to which plaintiff replied that the delay was not caused by his dilatoriness, but by the defendant requiring him to do extra work, and also by defendant not being ready for him when he began to work. The jury found for the plaintiff on all the issues thus raised.

Held, That the verdict should not be disturbed.

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4. Defendants instructed their agents at New York to charter a ship to carry certain goods thence to Sydney, C. B. The agents chartered plaintiff's ship, and the voyage was carried out and the goods delivered, and received by defendants. On the way to Sydney the vessel called at Halifax, where one of the defendants, who had previously received the charter-party, visited her. He was also present at Sydney when the goods were delivered. On neither occasion did he make any objection to the freight payable under the charter, but subsequently refused to pay it on the ground that the freight was too high, and that his agents had exceeded their authority in entering into the charter-party at that rate.

Held, That not having made any objection either at Halifax or Sydney, although fully acquainted with the rate of freight agreed to be paid, and having received the full benefit of the contract, he had thereby ratified it, and must fulfil his obligations thereunder.

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5. The plaintiff entered into a parol agreement with defendant, whereby in consideration of his maintenance, which was to be secured by defendant's bond with two sureties, he undertook to give defendant a deed of this farm. Neither the bond nor deed were given, but plaintiff lived with

defendant, and was maintained by him for several years. Then trouble arose between them, and plaintiff went away and brought an action to recover the farm. Defendant pleaded an equitable defense.

Held, that under chapter 89, *Revised Statutes*, section 6, the Supreme Court had full power to determine the equities between the parties, and that upon the defendant paying the costs of the suit, and giving the required bond, the plaintiff should execute to him a deed of the farm.

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6. Defendant made a verbal agreement with plaintiff to pay him for any work which R. might require him to perform. Plaintiff performed work for R. accordingly, and procured from him an acknowledgement in the following form, which he presented to defendant: "Balance due Mr. William Cox from Alexander Ross, at this date, one hundred and fifty dollars. (Signed) Alex. Ross." At the trial a verdict was found in plaintiff's favor, and a rule taken to set the same aside.

Held, that though the paper signed by R. was not in form such a paper as he ought to have prepared or as plaintiff ought to have accepted, it was sufficient, after verdict, to shew the amount and value of the work done by plaintiff for R., for which defendant had agreed to pay.

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Held, WILKINS, J., *dissentiente*, that under section 110 of the *Larceny Act*, 32 & 33 Vic., chap 21, sec. 3, the conviction must be sustained and that although the offence was probably committed at sea, the Court had full jurisdiction in the premises.

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QUASHED.

1. On an application for an order of filiation, there was no clear admission on the part of the reputed father, and no fact of intercourse sworn to except by the mother, whose evidence was shaken in many essential points. The conviction was quashed on appeal, and a new trial granted.

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2. Defendant having been summoned for selling intoxicating liquors without license, made a written confession, upon which the justices inflicted a penalty upon him as for a fourth offence. Defendant was not present at the trial, nor was any intimation given him of any intention to proceed against him, except as for a first offence. The original convictions in the three previous actions against the defendant were produced and read at the trial, but no other evidence was offered.

Held on *certiorari* that the conviction should be quashed.

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CORPORATION, Mortgage of property of.

The directors of a company incorporated under Acts of 1862, chapter 2, *Revised Statutes*, 3rd Series, 750,) entitled "An Act for the incorporation and winding up of joint stock companies," have power to mortgage the property of the company to discharge obligations for which the shareholders are liable, and would continue liable in their own persons, if there was no mortgage. The power to borrow money implies the power to mortgage. In making calls upon contributaries summonses will be granted by a Judge to the several parties requiring the amounts for which they are liable to be paid within a specified time, without costs, unless resisted.

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COURT, Equitable jurisdiction of.

1. Plaintiffs' cashier gave a bond wherein he was joined by five sureties for his fidelity and good conduct, the penalty of the bond being \$40,000, and the condition reciting that each surety was bound in the sum of \$8,000. The cashier became a defaulter in a very large amount, and the plaintiffs entered into negotiations with K., one of the sureties, which resulted in an agreement between them, whereby K. undertook to pay one-fifth of the balance due upon the bond after the deduction of certain credits, and gave his note for the amount. Subsequently, plaintiffs sued upon the bond, crediting in their particulars, the sum K. had promised to pay, but had not paid up to date of the trial. K. pleaded to the writ a number of pleas, one being that the bond was a several, and not a joint and several bond, and seven pleas on equitable grounds. The jury found for plaintiffs in a less amount, however, than they claimed, but they acquiesced in the verdict, and made no attempt to disturb it. K., alone of the defendants, resisted the verdict, contending that the bond was a several obligation, and that the receipt given by plaintiffs to him at the time of the settlement being in proof, should be considered as payment to that extent on his own account.

Held, that K. having invoked its equitable jurisdiction, the Court had full power to deal with the case, that the bond was a joint and several obligation, that if K. had actually paid the amount mentioned in the receipt he might have ground for complaint, but that not having done so the verdict for plaintiff must stand.

Bank of Nova Scotia v. Ferman et al...... 141

2. Plaintiff made an oral agreement with G., the owner of a gold claim, to work a portion of the claim, plaintiff receiving two-thirds of the profits after paying all expenses. Defendant, acting as Sheriff of the County of Hauts, levied upon and sold certain gold taken out of the mine by plaintiff on an execution against G. Plaintiff having brought trover for the gold so taken, and a verdict having passed in his favor.

Held, (1.) That under the agreement to work the mine for a share of the profits, no interest in the mine was transferred to plaintiff within the meaning of section four of the Statute of Frauds.

(2.) That the sheriff should have sold only the execution debtors share, leaving the purchaser to settle with the plaintiff.

(3.) That though the verdict for plaintiff might be set aside and a new trial ordered, it not appearing that the defendant by the sale put it out of the plaintiff's power to take the property, or pursue his remedy against the purchaser, yet the plaintiff having an undoubted right to a share, if not the whole of the gold, under the equitable powers of the Court, it ought to be referred to a Master to ascertain the agreement between plaintiff and G., take an account of the expenses of working the

mine, &c., and report the balance if any, which was due by the plaintiff to G. at the time of the levy. The question of costs to be decided after the making of the Master's report.

McDonald v. Goldert..... 561

See CONTRACT, 5.

CROWN LANDS, Assignment of right to receive grants of.
Rights of mortgage of right as against assignee.

See MORTGAGES.

DEBT, Notice of assignment of.

O'Connor v. Weeks..... 71

DEED.

See COLORABLE TITLE, MINOR.

———, **EFFECT OF RECEIPT ON.**

McDonald v. Bhis..... 283

DEFAULT, Removal of judgment by.

1. Defendant, against whom a judgment by default had been regularly entered up, applied within a year to have the judgment set aside, and to be allowed to come in and defend, disclosing a defence on the merits. Plaintiff was allowed to controvert the meritoriousness of this application, but the Judge decided to grant it on terms.

Held, That having so exercised his discretion, the Judge's decision would not be interfered with.

Semble, It is not a matter of right for plaintiff to reply by affidavit to applications of this kind, and where he is permitted to do so, he should confine himself to the establishing of such other facts, exclusive of merits, as might be considered sufficient to defeat the application.

Woodworth v. Cutten..... 394

2. A judgment by default will be set aside as a matter of course, and the defendant admitted to plead where the default has been marked in consequence of a misapprehension on the part of the defendant's attorney, unless there has been unreasonable delay in making the application.

What is reasonable time must depend upon the circumstances of each particular case.

Cook v. Sumner et al...... 596

DEMAND only necessary where something is to be done.

turing Co. v. Fairbanks..... 46

sustained.

erty contained the following clause. "It is agreed that the if the charterer ceases as soon as the cargo is on board, the a lien on the cargo for freight and demurrage." Plaintiff (the charterer) for the freight, setting out in their t the vessel was loaded and proceeded to sea with her vered the cargo, &c.

emurred.

ie demurrer should be sustained, as the declaration showed was not liable.

McLeod..... 307

DESERTION.

See BIGAMY.

DIRECTORS, Power of to mortgage.

See CORPORATION.

DISTRESS for rent.

See TRESPASS, 4.

DOWER, Waste by tenant in.

See WASTE.

EASEMENT.

Defendant demised to the plaintiffs a water power derived from the Dartmouth lakes from which water was also drawn for the supply of a canal. The power demised was to be of no less extent than plaintiffs then enjoyed, and as much more as defendant could spare after providing the water necessary for the working of the canal. Defendant having opened the sluice of the dam which retained the water, not for any needed use of the canal,

Held, That the water so expended was not expended within the exception in favor of the canal and was a violation to the plaintiffs' right to all the water with that exception.

Also, That defendant could not be permitted to raise the question whether the interference on his part was or was not practically injurious to the plaintiffs.

Personal service of a rule nisi is waived by appearance.

A demand is only necessary where something is required to be done, as money paid, deed executed, &c.

A rule nisi for an attachment for breach of an injunction need not state that it was granted on reading the injunction. All that is necessary is to produce the injunction in Court.

Starr Manufacturing Co. v. Fairbanks..... 46

EJECTMENT, Verdict in sustained.

Foster v. Foster..... 310

ESTOPPEL

Plaintiff's father mortgaged a lot of land to defendant, and subsequently defendant, with the consent and by the direction of the father, conveyed the lot in fee simple to N. M. After the death of the father, plaintiff brought suit under his will against defendant for the land.

Held, That the father, by consenting to the conveyance of the land in fee simple to N. M., was estopped from redeeming it, and as plaintiff was in no better position than her father, judgment should be for defendant.

McLeod v. Campbell..... 456

EXECUTION, Revivor of.

Where a first execution is sued out within six years of judgment it is not necessary to issue the next execution within six years from the issuing of the one last previously issued.

The appointment of a special deputy or bailiff by a party to a suit discharges the Sheriff from all responsibility.

Cochran v. Bell..... 488

EXECUTION, Sale of partnership property under for individual debts.

McDonald v. Geldert..... 551

EVIDENCE, Conflict of.

Plaintiff was book-keeper for defendant, and claimed a balance of salary due him, alleging that the hiring was for \$1600 a year. Defendant contended that plaintiff's salary was only \$1000, which had been paid him in full. Their respective statements as to the terms agreed upon between them were very conflicting, but in corroboration of defendant's was the fact that at the end of the year for which the salary was to be paid the plaintiff entered it in the books as only \$1000. The jury found for plaintiff.

Held, that there should be a new trial.

McNutt v. McDonald..... 175

_____, New TRIAL granted on discovery of new.

Renner v. Halifax Steamboat Co..... 336

_____, PLANS from Crown Land Office not shewn to be authentic rejected.

Walker et al. v. Bayers..... 270

See BILL OF SALE—CARRIER—CONVICTION.

PAROL EVIDENCE—RECEIPT.

FORCIBLE ENTRY.

Plaintiffs, as Trustees of a School Section, had occupied since 1858, a lot of land reserved for them by S. O., who, however, had omitted to give them a deed. In 1871 defendant obtained a deed from the heirs of S. O., knocked down the fence around the lot, and ploughed the land. Plaintiffs proceeded against him for forcible entry and detainer, but the Judge presiding at the trial ruled that in the absence of evidence of violence and terror, the complaint could not be sustained.

Held, That his ruling was correct.

Brundige et al. v. Thompson..... 356

FORECLOSURE AND SALE, Powers of Court in controlling.

1. Where an order of foreclosure and sale of a coal mine was made, B., one of the largest shareholders in the Company owning the mines, applied for an order directing certain coal to be sold first before dealing with the mine itself. The Judge refused to give the order, and B. appealed. The day of sale was fixed subsequent to the term, and with the understanding that if the cause was not reached on the last day of the term, a further postponement of the sale might be moved for. The cause not being reached and argued,

Held, That the sale should be postponed on terms being given by B.

Murdoch et al. v. Lawson et al ... 454

2. Plaintiff, who was mortgagee of certain coal areas, &c., having commenced an action of foreclosure against the defendants, who were trustees of the same, and obtained an order of sale, B., one of the *cestuis que trust*, applied to the Court on petition setting out that shortly before the date of the order there was ready for shipment at the mine a large quantity of coal which, if sold and the proceeds applied to that purpose, would be more than sufficient to pay the amount due on the mortgage, and claiming that the sale of the mine, under the circumstances, would be a great injustice.

Held, that, where equity to the *cestui que trust* requires it, especially if the mortgagee be not prejudiced thereby, the Court possesses the power and will exercise it to dispose of such portions of the mortgaged property as will least injure the mortgaged property and yet extinguish the debt.

The case was referred to a Master to take evidence on the subject of the coals alleged to have been raised, and report.

Murdoch v. Lawson et al. 532

FORFEITURE of Mining Areas.

The relators in this case sought to have a lease granted by the Crown, of certain gold mining areas set aside, on the ground that it had been granted, improvidently and in derogation of relators' rights. They had taken out a lease in April, 1862, but were in arrears for rent thereon in February, 1863, when a new lease was taken out, and some rent paid on its account, but none of the rent then over-due paid. After working on the areas for a month all operations were discontinued, and in October of the same year the Gold Commissioner declared the lease forfeited, and granted the areas to other parties. This lease also being forfeited another lease was granted to third parties in 1866, and in 1868 the relators sought to have this lease set aside, alleging that they had been misled as to the law by the Deputy Gold Commissioner, but this was contradicted.

Held, That the relators had not shown any ground for the lease being set aside, they having forfeited all claim to the areas, and that in any event, they were too late in applying for relief.

The Queen v. Snow et al. 373

SETTING ASIDE.

A lease of certain coal areas granted to S. was declared forfeited by the Commissioner of Mines, on the ground that the areas had been abandoned, and not effectively and continually worked for the space of one year. S. was absent from the Province at the time the proceedings were taken, and the only notice given him was by means of a paper posted upon a cliff near the sea-shore, the areas being under water. This notice was defective for want of definiteness as to the charges against S., and moreover, there was no evidence given before the Commissioner that the Sheriff who posted the notice had made any enquiry to ascertain whether there was any agent or person employed in connection with the premises upon whom, in the absence of S., the notice could have been served, nor was any evidence given as to the locality of the cliff upon which the paper was posted, or its contiguity to the areas in question.

Held, That the preliminary notice being deficient in so many points, all proceedings founded upon it were void, and therefore the forfeiture must be set aside.

In re Sword's Lease 389

FRAUDULENT conveyance.

In 1844, Alexander, the father of Hugh and Archibald, conveyed certain premises to Hugh upon the consideration of a bond for his maintenance given by Hugh. All three continued to live upon and work the premises together. In January, 1863, the plaintiff issued a writ against Hugh which ripened into a judgment in October, 1864. In June, 1864, Hugh conveyed to Archibald, the consideration being stated at the trial to be a verbal agreement that Archibald should assume the burden of maintaining the father, as Hugh wished to go away. In 1866, plaintiff obtained a judgment against Alexander the father, and in 1869 executions were issued upon both judgments, the lands were levied upon by the Sheriff, and sold thereunder, and a deed executed by him to the plaintiff, who thereupon brought an action of ejectment against the father and two sons, and verdict was found for the defendants. Upon rule nisi for a new trial,

Held, that Hugh's title, whatever it might have been worth at its inception, had become valid in 1866, the time of the plaintiff's judgment against the father, but the conveyance from Hugh to Archibald having been executed subsequent to the service of plaintiff's writ upon the former, and while the action was pending, and not being supported by any valuable consideration, must be deemed to be a fraud on Hugh's creditors, and void under 13 Elizabeth, ch. 5, and that therefore the rule *nisi* should be made absolute.

Smith v. McLean et al...... 109

GAS COMPANY not responsible to occupiers of property for injuries caused by defective fittings not the property of the Company.

Dodge v. Halifax Gas Co...... 325

Tremaine v. Halifax Gas Co...... 360

GOLD MINE

See **STOLEN PROPERTY.**

GRANT, Crown may attack for excess. Monuments referred to control quantities and distances.

Several crown grants from which plaintiff deduced his title purported to convey a specified number of acres, described as contained within lines commencing at a fixed point, and running specified distances to other points indicated by marked trees and other monuments, which appeared upon plans annexed to and referred to in the body of the grants.

Held, That the monuments, being ascertained, must control the quantities purported to be granted, and the distances mentioned in the grants, notwithstanding the fact that the number of acres included in that case would be enormously in excess of the number which the grants purported to give. The least objectionable of all difficulties is to make quantities, whether too great or too small, yield to actual monuments on the ground.

Per Sir W. Younge, C. J.—The grants might have been attacked by the crown for excess but, in the absence of such proceedings, the land included could not be re-granted to a stranger. Under the usage of the Court, parol evidence is admissible to shew the actual position and surveys of lands included in grants of wilderness and wood lands.

Davison v. Benjamin...... 474

GUARANTEE

1. H. K. R., having been employed by defendant to build a vessel for him, employed plaintiff as a sub-contractor, to plank her. Defendant executed and delivered to plaintiff a guarantee, based upon an agreement between the latter and H. K. R., for the performance of the sub-contract, which had been drawn up but which was not signed. A clause varying its terms having been added to the agreement subsequent to the giving of the guarantee.

Held, that the effect of the variation was to relieve the defendant of all liability on the guarantee.

Thibedeau v. Ryerson...... 221

2. C. being largely indebted to plaintiff, an agreement was entered into in December, 1869, that on or before May 1st, 1870, all accounts should be settled and adjusted between them, and that then C. should pay to plaintiff the full amount found due to him on such adjustment in three and six months from the said May 1st. It was further stipulated in the agreement that in the event of C. failing to adjust and settle the accounts on or before the day mentioned, then plaintiff might cause an adjustment

to be made by one F. by May 15th, or as soon thereafter as the same could be completed, which adjustment should be as binding upon the parties, as if made by them in person, and the amount found due thereon to be paid as before stipulated. The performance of this agreement, on the part of C., was guaranteed by the defendants, without any limit being stated as to their liability thereunder. No adjustment of the accounts being made in December, 1869, C. and one of the defendants sought, in April, 1870, to effect a settlement with plaintiff, but could not succeed owing to plaintiff's conduct, and on May 10th the whole matter was handed over by plaintiff to F. who, however, was prevented from giving immediate attention to it, and did not make his award until December 22nd, 1870, when he found that there was due to plaintiff the sum of \$10,924.60. Plaintiff having sued defendants on their guarantee, they pleaded fraud and misrepresentation, and that plaintiff had, by his own conduct, released them from their liability. In support of the first defence they introduced strong evidence to prove that, at the time of the signing of the guarantee, plaintiff had largely underestimated the amount of C.'s indebtedness to him, in order to induce them to enter into the guarantee. This plaintiff denied.

Held, That whether or not plaintiff had deceived them as to the amount of C.'s indebtedness to him, they were relieved from all liability under the guarantee, because he had by his own conduct so delayed the adjustment between himself and C. as to materially alter their position, the agreement being that on the amount being ascertained C. should pay plaintiff in three and six months from May 1st, whereas F.'s award was not made until more than the six months had fully expired, and this delay discharged the defendants.

The declaration was so framed as to allege that defendants, as sureties, were liable to pay to plaintiff in one sum, on the 22nd December, what by the agreement declared upon, and whose performance they had guaranteed, C., their principal, was bound to pay in two sums on 1st August and 1st of November, respectively. It also contained a count on an account stated. Defendants demurred to the whole declaration.

Held, That there should be judgment for the defendants on the first count, and for the plaintiff on the second.

Adams v. McFarlane..... 379

HUSBAND, Liability of for support of wife.

Defendant having seduced plaintiff's sister, was induced to marry her by the solicitations of her father, who professed his willingness in such case to support her. Immediately after the marriage defendant left his wife who, without notice to her husband, went to live with her brother, the plaintiff, with the intention of charging her husband with her support.

Held, that plaintiff could not recover.

Manning v. De Wolf..... 261

_____, LIABILITY OF FOR WASTE committed by the wife before marriage.

Titus et al. v. Sulis et al 497

HUSBAND AND WIFE.

See BIGAMY.

INJUNCTION, Attachment for breach of.

Starr Manufacturing Co. v. Fairbanks..... 46

INSOLVENT, Discharge of suspended.

The insolvent, having determined to stop business, disposed of the stock of goods on hand to his daughter, for the sum of \$1,000, who continued the business for the benefit of the family, the insolvent assisting as clerk. No money was paid by the daughter for the goods at the time of purchase, or subsequently, nor was any security taken, but at the time of the assignment, about a year after, the insolvent handed to the assignee the note of one A. for the sum of \$1,000, which was never paid. It was admitted by the insolvent that after he ceased to do business he collected debts due him, and lived upon them, and paid nothing to his creditors. No inventory was taken or valuation made of the goods at the time of the sale, but the insolvent said that the sum of \$1,000 was about their value. The Judge of Probate having granted a discharge with a first-class certificate, from which the creditors appealed,

Held, that, though the insolvent might not have deprived himself of all right to a discharge, under the circumstances, it should be of the second class, and suspended for the period of two years.

Re Donald Matheson..... 538

INSOLVENT ACT, Policy of.

Harvey v. Cotter..... 161

INSURANCE, FIRE, Effect of verbal transfer of policy.

See ASSIGNMENT.

INSURANCE, MARINE

1. The Association of which defendant was a member issued a policy insuring plaintiff's vessel against total loss for the period of one year. The vessel, while on a voyage from St. Domingo to Boston, encountered a violent storm, in consequence of which she was obliged to run for Bermuda, where she arrived in a badly damaged and leaky condition. A survey was held on February 26th and again on March 10th, to ascertain the extent of damage, but in the interim, on the 6th March, the master wrote the plaintiff informing him that the expense of repairing at Bermuda would be more than the vessel had cost or was worth, and stating that he would abandon her to the underwriters and sell her for the benefit of all concerned. The sale was held on the 13th March and the result communicated to the plaintiff by letter dated the 15th. The plaintiff testified that the contents of the first letter were communicated to the underwriters, and a verbal notice of abandonment given, and a claim for a total loss made, but the evidence on these points was contradictory. The jury found a verdict for plaintiff and a rule was taken to set it aside.

Held, per *SIR W. YOUNG, C. J.*, That the oral abandonment by plaintiff, coupled with the exhibition of the master's letter of the 6th March, and his claim for a total loss was enough to satisfy the law. Also, that notice was in time, even though the sale on the 13th March, reduced it to a matter of form and gave the underwriters no option and no opportunity to repair.

Per JOHNSTONE, E. J., The time at which the notice of abandonment was given was essential to plaintiff's right to recover, and it appearing that the sale was made before the abandonment, or, at least, that it was doubtful, there must be a new trial.

If the sale were made before notice of abandonment to the underwriters, the sale would be the act of the agent of the owners, and inasmuch as it would deprive the underwriters of the option of repairing the vessel or otherwise dealing with her, the abandonment would be ineffectual.

The cost of repairing the vessel taken in connection with her value when repaired, would have justified abandonment, but the vessel being in a place of safety, and there being regular opportunities for communicating

with the owners and underwriters, the sale in the absence of such communication was illegal.

Per WILKINS, J. The case being one of constructive total loss, and no circumstance being proved to take it out of the established rule of law, due notice of abandonment to the underwriters was an essential condition to the plaintiff's right to recover. Notice being essential the onus of establishing it was on the plaintiff. The notice contained in the master's letter of March 6th, supposing it to have been communicated to the underwriters was ineffectual as it gave them no opportunity of electing to repair the vessel. Urgent necessity alone, the existence of which was negatived, could have made the sale lawful.

Morton v. Patillo 1

2. An action is not maintainable as for a total loss of freight where it appears that the vessel might have been repaired at a reasonable cost within a reasonable time, and conveyed a portion of the cargo to the port of destination.

Where a policy of insurance was issued on freight on a voyage "at and from Buenos Ayres to Matanzas, Cuba," and there was an endorsement on the policy: "Permission granted under this policy for the barque 'Daniel' to proceed from Monte Video to Cardenas, calling at Barbadoes for orders instead of Buenos Ayres to Matanzas."

Held, that the policy and the endorsement must be read together, and, that so read, the voyage insured must be taken to have been a voyage from Buenos Ayres to Cardenas, with liberty to go to Monte Video as an intermediate port.

Wilson v. The Merchants' Marine Insurance Co 81

8. Plaintiffs insured their vessel with defendants on time, the policy being stated to be "against total loss but subject to general average," and also containing the following special clause, viz.: "that the acts of the assured or assurers in restoring, saving and preserving the property insured in case of disaster shall not be considered a waiver or acceptance of the abandonment." The vessel was stranded in St. John harbour, and, after a careful and competent survey, declared to be so much damaged as to be not worth repairing, and the plaintiffs thereupon gave notice of abandonment to the defendants and ordered a sale of the ship. The defendants sent an agent to the spot who succeeded in a few days in having the ship floated and placed in a situation to be repaired, whereupon they notified the plaintiffs that they declined to accept the abandonment, and required the plaintiffs to take the vessel and repair her. The plaintiffs, however, proceeded with the sale, and the ship was bought in by the defendants, registered in the name of their agent and repaired and navigated at their cost and for their benefit for two years. Plaintiffs claimed for a total loss.

Held, that although it was not an absolute but a constructive total loss, notice of abandonment having been duly given, the liability of defendants attached.

That no special form of notice of abandonment was required provided the intention to abandon was clearly made out.

That as the plaintiffs had acted upon the judgment of competent survivors that the vessel was not worth repairing, and upon their own bona fide opinion, they were justified in the abandonment and sale of the vessel:

And finally, that although if, under the special clause in the policy the defendants, after repairing the ship had tendered her back to the plaintiffs the latter would have been bound to accept her, yet not having done so but retained her for their own benefit, they must be held to have accepted the abandonment, and must therefore pay to plaintiffs the full amount of their claim.

Baker et al. v. Brown 100

4. Defendant was agent for the owners of a vessel, and acting as such had her insured with plaintiffs in the sum of \$800. On the vessel being lost the plaintiff paid him the full amount, and then subsequently discovered that the policy had been void on the ground of over-insurance,

the vessel being valued at \$4,000 only, while she was insured in two other companies for \$11,200 prior to being insured with plaintiffs, of which fact they had no knowledge when they insured her. When this became known to them they sought to recover back the amount paid defendant. The defendant had not been aware of the 'over-insurance, and had acted in perfect good-faith. Soon after receipt of the money, and before notice from plaintiffs, he had accounted with his principals for the full amount in a settlement between them.

Held, that the defendant could not be compelled to refund the amount.

Union Marine Insurance Co. v. Metzler..... 331

5. Plaintiff shipped a cargo consisting of dry and pickled fish, pork, oats, peas, &c., to Demerara, part of the cargo being on deck, and insured it with defendants. By the policy the latter were not to be liable for partial loss or particular average, unless amounting to five per cent., and as to the oats and dry fish, to be free from average unless general. On the way the vessel encountered very heavy weather, lost all her deck-load, sprung a leak, sustained damage to her rigging, and so was compelled to put into Barbadoes for repairs, where the cargo was landed, and after survey sold by the master. The cargo was all more or less injured by water, and according to the evidence, the fish, if re-shipped, would have been of little value when it reached its destination. The plaintiff knew nothing of what had been done, until he received the account sales of the cargo, with the protest and survey, and these he at once sent to the defendants. He claimed for a total loss. Defendants contended that the loss was only partial, and that the cargo ought to have been forwarded. From the evidence it did not clearly appear that the cargo was, upon the whole, so injured as that if forwarded to its destination, the expense would have exceeded its value on arrival there. There was no question but that the master, acted in good faith, and just as a prudent uninsured owner would have done under the circumstances.

Held, That in the absence of conclusive evidence that the cargo might not have been sent on to its destination, at an expense less than its probable value there, the loss must be considered partial, and the defendants liable only for general average, with the exception of the deck-load, which was a total loss.

The proper test in respect to goods which have been sea-damaged and taken to an intermediate port, whether memorandum articles or not, is not whether an uninsured owner would have sold them there, but whether they can be sent on to their destination at a less expense than their value on arrival there, for when the whole or any part of the cargo can be sent on, the master has no authority to sell, nor can the assured recover for a total loss.

Watson v. Mercantile Marine Insurance Co..... 396

6. Plaintiff insured his vessel with certain underwriters, of whom defendant was one, and among the conditions of the policy were that the vessel should not proceed to South Greenland, and that any action upon the policy must be brought within twelve months after the claim for loss had been presented. The vessel was lost on a voyage to South Greenland, and the action was not brought until nearly six years after receipt of proof of loss. Plaintiffs contended that independently of the policy they could maintain an action on the "slip," and also tried to explain away the prohibition as to South Greenland, and to prove a waiver of the condition limiting the time for bringing the action.

Held, that no action could be maintained upon the "slip" after a policy had been executed in pursuance of its requirements, and accepted and acted upon by the plaintiffs, and the plaintiffs having failed to remove the objections founded upon non-fulfilment of the conditions above stated, that the verdict for defendants should be sustained.

Robertson v. Lovett et al..... 424

INTEREST, Taking more than legal.

See PROMISSORY NOTE, 3.

INTERPLEADER, In cases of the Court may consider the equitable rights of the parties.

Manning v. Bowman..... 42

INTOXICATING LIQUORS, Note for balance on settlement of account.

See **PROMISSORY NOTE**, 1.

JUDGE, Discretion of.

See **DEFAULT**.

JUDGMENT, Application to set aside refused.

Hare v. Murphy..... 202

2. Defendant gave plaintiff a warrant of Attorney to secure the price of a lot of land. Plaintiff entered up judgment, and issued execution which defendant sought to have set aside on the ground that there was an endorsement on the warrant giving him ten years' time, which had not expired. Plaintiff admitted the endorsement, but claimed that it had, at the time of its execution, been erased with the consent of defendant. Defendant alleged that the erasure was accidental, and had occurred subsequently. The evidence corroborating plaintiff's position,
Held, that the judgment should remain, and execution issue.

Morse v. Ripley..... 461

JURISDICTION OF COURT.

1. Action was brought by plaintiff against defendants, a company incorporated in Nova Scotia, but residing in the United States, and not British subjects. An attorney in Halifax was retained by them to defend the cause, and took some proceedings therein, and, according to the affidavit of plaintiff's attorney, promised to appear and plead. This, however, defendant's attorney denied. Plaintiff's attorney, after some years' delay, applied to the Court for an order requiring defendant's attorney to enter an appearance, in order that the Court might have jurisdiction.

Held, that if defendant's attorney had given a signed undertaking to appear, he would be compelled to do so; but that otherwise the Court had no jurisdiction, and could not grant the desired order.

Belloni v. Sydney & Louisburg Railway Co..... 137

2. In an action to recover a debt, defendant produced a certificate of his discharge as a bankrupt.

Held, that it was not competent to the plaintiff in this action to shew irregularity in the proceedings in the Insolvent Court, or to attack the discharge on the ground that defendant was not a trader, and therefore not a legitimate subject of the jurisdiction exercised.

Beulair v. Gilliatt..... 525

OVER OFFENCES COMMITTED AT SEA.

The Queen v. Martin..... 124

LACHES, *Certiorari* quashed where there has been.

Doggett v. Tremain et al..... 419

See **RECORD**, Party to.

LAND, Acquirement of colorable title to.

Boyd v. Millet..... 292

———, EFFECT OF ACTS OF OWNERSHIP OVER.

See TRESPASS.

——— FOR RAILWAY PURPOSES.

See RAILWAY.

———, MORTGAGEE ENTITLED TO POSSESSION OF.

See MORTGAGEE.

———, PAROL AGREEMENT AFFECTING.

See LICENSE.

LIBEL, Privileged communication.

Plaintiff was a land surveyor, appointed by the Government of the Province, and defendant wrote a letter to the Provincial Secretary, complaining of plaintiff's conduct, and making certain charges against him, whereupon plaintiff proceeded against him for libel. Defendant pleaded that his letter was a privileged communication. The Commissioner of Crown Lands, and not the Provincial Secretary was the person to whom the letter should properly have been addressed. The learned Judge who tried the cause directed the jury that if they thought the letter was, in view of plaintiff's official relation to the Government and the Crown Land Department, written in good faith and without malice, it was a privileged communication. The jury found a verdict in favor of the defendant. On argument of the rule to set the verdict aside,

Held, that although the letter should strictly have been addressed to the Crown Land Department, yet that the Judge's direction was right, so rule was discharged.

Kerr v. Davison..... 354

LICENSE

Defendant made and delivered to plaintiff a memorandum (not under seal) in the following terms: "I do hereby agree to lease to you, Wm. Hendry, the privilege of light in the west side of your building, &c., for a term of ten years from this date, at a yearly rent of twenty-five cents per annum."

Held, that the memorandum constituted a mere license revocable at defendant's pleasure.

Hendry v. Scott..... 315

———, EVIDENCE OF LEAVE AND LICENSE was properly refused in the absence of a plea.

Haggarty v. Pryor..... 358

See TRESPASS.

MINE, Agreement to work for a share of the profits not an interest within the Statute of Frauds, section 4.

McDonald v. Geldert..... 551

MINING LAW.

See FORFEITURE OF MINING AREAS.

MINOR, Deed by.

R. M. in 1835, conveyed a portion of his land to his sons W. & K., and about the same time allowed them to enter into possession as tenants at will of the balance of his property including the house in which he had resided. R. M. died in 1844, leaving several children, of whom the plaintiff was the youngest. In 1847, the rest of the heirs, including plaintiff, who was then under age, conveyed to W. & K. all their interest in the property. In 1870 the plaintiff brought suit for a portion of the lands in question, alleging that the deed being executed during her minority, was absolutely void and of no effect.

Held, that although the possession of W & K. must be deemed to be adverse from the year 1847, when the heirs united in giving them a deed, and that therefore plaintiff's right was barred on that ground, yet that under Section 9 of 29 Vict., Chap. 12, having brought her action in 1870, and therefore within five years from 1866, she was entitled to recover.

McKinnon et al. v. Brodie..... 410

MORTGAGEE, Conveyance of land in fee simple by with the consent of the mortgagor estops the latter.

McLeod v. Campbell..... 456

————— GIVEN PRIORITY over an unrecorded deed.

J. R. McL., being entitled by right of his wife, to an interest in certain real and personal property, being an estate of which M., the wife, was one of the heirs, they joined in a mortgage to plaintiff of all their said interest. On plaintiff seeking repayment of the amount loaned, defendant, one of the executors of the estate, resisted the claim on the ground that six years previously, J. R. McL. and his wife had conveyed all their interest in said estate by deed poll to her mother. This deed was never recorded, and the plaintiff did not know and had no means of knowing of its existence. The mother, although aware of plaintiff's mortgage at the time it was made, concealed from him the fact of the deed to her.

Held, That having so concealed from plaintiff what it was her duty to reveal to him, the mortgage should be given priority over the deed poll, and plaintiff's claim satisfied out of the estate.

West v. Matheson et al...... 429

—————, RIGHTS OF AS AGAINST THE MORGAGOR.

A mortgagee, in the absence of any express covenant or stipulation to the contrary, is entitled to enter upon and take possession of the lands and premises conveyed in the mortgage at any time, although, as an almost invariable rule in this country, the mortgagor remains in possession until default in fulfilment of the conditions of the mortgage.

Dunn v. Miller..... 347

—————, RIGHTS OF AS AGAINST THE MORTGAGOR'S ASSIGNEES.

T. A. and J. A. were entitled to receive grants of certain Crown Lands upon which the price had been paid to the Government. Before taking out their grants they mortgaged their rights to plaintiff. Subsequently they became insolvent, and made a general assignment to defendants for the benefit of their creditors. The defendants, as such assignees, applied for the grants and had them made out to themselves, selecting lots in different localities from those indicated in the original application, but the money paid for them was that paid on the original application. On the plaintiff seeking repayment of the amount loaned by him to T. A. and J. A., the defendants refused to satisfy his claim.

Held, that as assignees of the A.'s, they had only succeeded to such rights as the A.'s possessed at the time of the assignment, and those rights having been mortgaged to plaintiff, his claim should first be satisfied before they could deal with the land granted to them.

Stephens v. Twining et al...... 445

NEGLIGENCE of Civic Corporation.

The plaintiff and his wife while walking along one of the streets of Halifax fell into an open sewer and sustained injuries, for which they brought an action against the city and were awarded damages. The City then applied for a new trial.

Held, that the City, although not provided by the legislature with funds for that purpose, was liable for any acts of negligence on the part of their servants or employees in and about the streets.

Secondly, that the plaintiffs must clearly shew that they have not been guilty of negligence themselves. And this not having been done, although the declaration contained averments that the plaintiffs had employed ordinary caution, a new trial was ordered.

Ward et ux. v. City of Halifax..... 264

OF LANDLORD.

Plaintiff was tenant of a shop in a building owned by defendant, the upper portion of which was occupied by other tenants. It having become necessary to make certain repair to the roof of the building, a portion of the roof was removed at defendant's instance without notice to the plaintiff. Owing to the negligent manner in which the work was done, rain fell into the building and ran through and injured the plaintiff's goods.

Held, that the work was done by defendant at his own risk, and that he was responsible to the plaintiff for the injuries sustained by her in consequence of the damage to her goods.

Semble, there being a count in which such a claim was made, that it might properly have been left to the jury to ascertain the damage sustained by plaintiff in consequence of the breaking up of her establishment and the loss of her business.

Engley v. McIlreith..... 511

OF SERVANT.

Defendant's servant, while driving at a rapid pace on the wrong side of the road, came into collision with plaintiff's horse, whereby plaintiff was injured. There being no contributory negligence on the part of plaintiff,

Held, that defendant was liable.

Martin v. Taylor..... 94

OF RAILWAY COMPANY.

Plaintiff, a passenger travelling by the Windsor & Annapolis Railway from Annapolis to Richmond, fell while alighting from the train at the latter place and sustained injuries, to recover damages for which he brought an action against the company, charging them with negligence in respect to the lighting of the station, and the provision of safe means of transit of passengers from the cars to the platform. The evidence on these points being contradictory, and the jury having found for the defendant, the Court refused to disturb their verdict.

Curwin v. Windsor & Annapolis Railway Co...... 493

NEW TRIAL

1. In an action against defendants for damages a verdict was found for plaintiff, and subsequently defendants applied for a new trial on the ground of new and important evidence having been discovered which was unknown to them at the trial, and which, their agent in his affidavit stated, was such as he believed would entitle them to a verdict.

Held, that a new trial ought to be granted on the defendants paying the costs of the first trial.

Renner v. Halifax Steamboat Co. 336

2. Where plaintiff replevied certain logs from defendants under a bill of sale, and among those rightfully belonging to him were a number belonging to the defendants, which the latter had mixed up with them under the belief that they were all their own.

Held, that there should be a new trial, in order that defendants might have an opportunity of proving what part belonged to them, and what to the plaintiff.

Stewart v. Wheeler et al. 414

3. A rule for a new trial will be refused where the Court can see clearly that real and substantial justice has been done.

A wrong observation by a Judge on a matter of fact which is left as a matter of fact for the jury is no ground for a new trial.

Lordly et al. v. McRae et al. 521

ORDERED FOR MISDIRECTION.

Smith v. McEachren. 35, 279

See CARRIER, CONVICTION, EVIDENCE.

MARINE INSURANCE, NONSUIT.

NONSUIT.

A witness for plaintiffs was allowed to leave the Court on the understanding that he would immediately return if sent for. The cause being called, the witness was sent for and proceeded toward the Court, but returned home on being informed by some of the jurymen in the previous case that the Court had adjourned for the day. The witness not appearing plaintiffs applied to have his evidence taken at a future day. This being refused and the evidence being material they became nonsuit. Under the circumstances, and it appearing that the plaintiffs did all that was necessary to obtain the attendance of the witness, a new trial was granted on payment of costs.

Green et al. v. Hare. 33

See CARRIER.

NOTICE of Abandonment.

See INSURANCE, MARINE, 1, 3.

OF DISHONOR.

See PROMISSORY NOTE, 5.

OFFSET.

See PROMISSORY NOTE, 4

PAROL EVIDENCE admissible to shew the actual position and survey of lands included in grants of wilderness and wood lands.

Davison v. Benjamin..... 476

PARTITION.

Plaintiff sought to set aside the return made in an action of partition by the commissioners duly appointed upon the ground that they had improperly allotted to one of the partitioners a lot of land below its value, and below the price plaintiff had notified them he would pay for it. The evidence in support of plaintiff's claim consisted simply in the fact that having by some means obtained a knowledge of the decision of the commissioners before they signed their return, he had offered them \$2,000 more for the lot in question than the value they had placed upon it.

Held, no ground for disturbing the return.

Lecain v. Hosterman et al..... 178

PARTNERSHIP PROPERTY, Execution against for individual debts.

See COURT, Equitable powers of.

PART-OWNER, Liability of for goods supplied vessel.

Action for the cost of a set of sails furnished to a vessel of which defendant was part-owner, and one McR., master. Plaintiffs had a private account with McR., and in their ledger the charge for the sails appeared in that account. They had no separate account against the vessel, and it seemed that on McR.'s becoming insolvent some time subsequent, they had received a dividend upon his whole indebtedness, including the charge for the sails. Plaintiffs called defendant as a witness, and on examination he denied that the vessel required the sails when they were purchased, but stated that he had settled with McR. for them about a year after, although he had never authorized McR. to procure them. Defendant called no witnesses, and the jury found for him.

Held, that there was no ground for disturbing their verdict.

Black v. Haliburton et al..... 207

PAYMENT INTO COURT, Effect of.

Baird v. Anderson et al..... 181

PENAL STATUTE, Construction of.

See PROMISSORY NOTE, 1.

PEW-HOLDER, Interference with rights of.

See ASSAULT.

PLEADING.

———, COUNT WHARFAGE RECOVERABLE UNDER *inlebitatus assumpsit*.

De Wolf v. Punchard..... 224

PLEADING, Declaration.

See PLEA.

_____, DEMURRER.

See CONTRACT.

_____, INTERPLEADER.

See ASSIGNMENT.

_____, PLEA.

Section 119, chapter 134, *Revised Statutes*, (3rd Series,) in reference to joinder of different causes of action in the same suit, applies only to civil suits and not to proceedings of a mixed civil and criminal nature.

Plaintiffs' fourth count was as follows: "That the said bill of exchange and promissory notes above declared upon were discounted by the plaintiff, and the money advanced to the defendant therefor was so advanced upon the representation of the said T. G. Budd that the said firm of Wm. L. Dodge & Co., the defendants, had assets to a large amount over and above all their indebtedness at the time said advances were made, and the plaintiffs say that in truth and in fact the said Wm. L. Dodge & Co., the defendants, had no such assets, as the said T. G. Budd well knew, and the said defendants obtained the discount and advances declared upon by false and frivolous representations, and under false pretences."

Held, bad on demurrer, 1st, because it did not allege that Budd obtained the discount and advances on the bill and note declared upon, with intent to defraud the plaintiffs; 2nd, because it did not allege that the debt had not been paid, and 3rd, because it did not allege the offence charged against or act committed by Budd to be contrary to the statute.

Bank of British North America v. Budd et al...... 97

_____, REPLICATION.

Defendant pleaded as a set-off to plaintiffs claim a bill of exchange accepted by plaintiff and endorsed to him. Plaintiff replied that the bill at the time of its acceptance and endorsement was not stamped according to law. Defendant demurred.

Held, that the replication was good, and that if the stamps were affixed after the acceptance or endorsement, it was for defendant to rejoin the facts which justified him in subsequently affixing them.

Butler et al. v. Evans... 171

POLICY OF MARINE INSURANCE, Construction of.

Wilson v. Merchants' Marine Insurance Co...... 81

POSSESSION must be exclusive to maintain trespass.

See TRESPASS.

PRACTICE, Amendment.

See BAIL PIECE.

_____, PLEAS SETTING ASIDE.

1. Under *Revised Statutes*, (3rd Series,) cap. 134, sec. 71, pleas will be set aside, when assailed on affidavit, and where they appear upon argument to be false, though a part of the pleas may be sustained. The defendant, (unless in exceptional cases,) should pay the costs of setting aside such pleas as are false, leaving the costs of moving to set aside such pleas as are sustained to abide the event.

Stephenson v. Celford... 50

2. Plaintiff sued on a promissory note for \$79.25, and defendant pleaded the usual pleas, denying the making, consideration, &c. Plaintiff applied at Chambers to have the pleas set aside as false, frivolous and vexatious, and in opposing his motion defendant produced an affidavit in which he admitted indebtedness to the amount of \$42.72, but no more, and alleged that his pleas were not pleaded for purposes of delay, but that justice might be done. The Judge at Chambers set the pleas aside, and defendant appealed.

Held, that his appeal would be sustained provided the \$42.72 was paid into Court within ten days. Otherwise plaintiff should retain his judgment.

Hill v. Culman..... 352

_____, NOTICE, Service of.

See ATTORNEY.

_____, RULE in first instance.

See AWARD, 2.

PRINCIPAL AND AGENT.

See CONTRACT, 1.

PROMISSORY NOTE.

1. Plaintiff supplied defendant with merchandise, and, among other things, with intoxicating liquors in quantities of less than one gallon delivered at one and the same time. Defendant, on the other hand, supplied plaintiff with articles which were placed to his credit in plaintiff's books of account. On a settlement of accounts plaintiff struck out of his account all charges for liquors supplied as above, and, with defendant's consent, deducted a like amount from the latter's credits by way of payment for the liquor. Defendant having given a promissory note for the balance,

Held, that the note so given was not void under *Revised Statutes*, (3rd Series,) chapter 19, being neither for nor to secure intoxicating liquors in any quantity as forbidden by the statute. The statute being restrictive of the common law, and of a penal character must receive a restrictive construction, and on no account should be construed to mean other than the plain ordinary meaning the words would convey.

Smith v. McEachern..... 35

2. Where a promissory note is defective for want of a stamp the plaintiff may recover the amount of the consideration on a count for account stated, notwithstanding that the consideration of the note is for an interest in land.

Frost v. Brennan 40

3. Plaintiff with his brother, the Rev. G. P., entered into a promissory note on Nov. 30th, 1867, by which they agreed to pay to the order of D. & Co., the defendants, \$1,400 with interest in one year after date. When the note fell due interest at the rate of six per cent was paid upon it, and the note was allowed to lie over. On December 3rd, 1869, plaintiff paid another year's interest with two per cent. additional which the defendants demanded for extending the time.

Held, that the additional charge so made was within the prohibition against taking more than legal interest contained in chapter 82, *Revised Statutes*, (2nd Series,) and that defendants were liable to the penalties therein imposed.

Patterson v. Duffus et al...... 52

4. Plaintiffs consigned goods to the defendants to be sold, and the proceeds handed over to D. S. D. S. being indebted to defendants gave them a promissory note for the amount and died leaving his estate in an insolvent condition. An action having been brought by the executors of D. S. in the name of plaintiffs to recover the amount arising from the sale of the goods,
Held, that defendants were entitled to offset the amount of the note given by D. S.
Chisholm et al. v. Chisholm et al...... 85
5. Plaintiff sold to defendant a quantity of hides, some of which, under the defendant's instructions, were delivered to his agents, A. & Co., who gave to plaintiff their note for the amount due him. Plaintiff thereupon entered in his book, "settled by note of \$123." A. & Co. having become insolvent, the note was dishonored.
Held, that the jury were not warranted in regarding the entry in plaintiff's book as evidence of anything but a conditional payment.
Also, that defendant, not being a party to the note, there was no necessity to give him notice of dishonor.
Anderson v. Archibald..... 88
6. Plaintiffs were holders of a note made by R. C. & Co., and endorsed by M. R. & Co. M. R. & Co. became insolvent, and effected a composition at fifty cents on the dollar, including their endorsement for R. C. & Co. R. C. & Co. also becoming insolvent, the plaintiffs sought to prove against their estate for the full amount of the note.
Held, that they could only prove for the balance after deducting the composition received from M. R. & Co.
Bank British North America v. Harvey..... 416
7. G. W. R., having purchased a quantity of goods from the firm of B. & M., gave them in payment therefor a promissory note made by himself, payable to the order of B. & M., upon the back of which the defendant, for the accommodation of G. W. B., had endorsed his name. In an action by plaintiff, surviving partner of the firm of B. & M., against defendant, there being no evidence of an intent on the part of defendant to stand in the ordinary relation of an endorser to the payees,
Held, that defendant was not liable.
Burns v. Snow..... 530

QUEEN'S COUNSEL, Precedence of.

R. having been appointed a Queen's Counsel under a commission from the Governor-General of Canada, his precedence was questioned by W., who was his senior at the bar of Nova Scotia, but held no appointment as Queen's Counsel either from the Governor-General or the Lieutenant-Governor. W. moved to have his cause entered on the docket prior to that of R.

The motion was dismissed.

Lordly v. Kiely..... 506

RAILWAY, Limitation of powers of company.

Defendants were empowered by statute to enter and take possession of lands required for the track of their railway, stations, etc., the lands taken to be laid off by metes and bounds, and a plan and description of it recorded in the Registry of Deeds for the county where the land was situate. The statute prescribed the extent of land to be taken.

Held, that the company could not, by making a survey or filing a description, acquire a title to private property lying beyond the statutory limits.

Wharfage is recoverable under counts of *Indebitatus Assumpsit*, that being the proper form in which to proceed.

De Wolf v. Punchard et al...... 224

RECEIPT.

The body of a deed acknowledged the payment of the purchase money in the usual form, and a receipt therefor signed by plaintiff was also endorsed, but subsequent to the sale a dispute arose as to whether the amount stated in the deed included a mortgage existing on the property, or whether the purchaser was to pay that also.

Plaintiff having sued for the amount of the mortgage,

Held, that in the face of the endorsed receipt, and of certain evidence adduced in confirmation thereof, he could not recover.

McDonald v. Blois..... 283

RECORD, Party to.

In a case of replevin the defendant withdrew his pleas and gave a confession, upon which plaintiff regularly entered up judgment. Some time subsequently W., who was not a party to the suit, but who claimed the goods replevied under an assignment from the defendant, and was one of the sureties upon the replevin bond to the sheriff, sought to have the judgment set aside, on the ground that the confession was a fraud upon him and the other creditors of defendant, and also that he had joined with defendant in the pleas which had been withdrawn without his sanction. This latter allegation was denied both by defendant and defendant's attorney, whom W. swore he had instructed to act for him.

Held, that W. not being a party to the record, had no *locus standi*, his redress, if any, being against defendant's attorney, and also that he had been guilty of *laches*.

Hare v. Murphy..... 202

REPLEVIN, Evidence insufficient to maintain.

Carr v. Carey et al...... 213

_____, Possession sufficient to maintain.

McNab v. Sawyer..... 38

ROAD, Rule of the.

Martin v. Taylor..... 94

SALE of Land under foreclosure postponed.

See FORECLOSURE AND SALE.

SERVANT, Liability for negligence of.

Martin v. Taylor..... 94

SHERIFF, Appointment of special deputy discharges.

Cochran v. Bell..... 488

SLANDER.

Plaintiff claimed damages for slander, alleging in his declaration that defendant had spoken certain words about him in relation to his business, to the effect that he was guilty of fraudulent conduct in said business, and was untrustworthy and unprincipled in his way of carrying it on, whereby plaintiff was injured in his credit and reputation, and his customers were caused to limit their dealings with him, and to withhold business from him.

Held, that there was no need of alleging or proving special damage.

Paat v. Maclean..... 316

STAMP.

See PROMISSORY NOTE, 2—PLEADING—REPLICATION.

STATUTE OF LIMITATIONS.

Plaintiff sued for goods sold and delivered. Defendant pleaded the Statute of Limitations. Plaintiff replied that at the time the action accrued defendant was absent from the Province, and that suit was brought when defendant came within the jurisdiction of the Court. Defendant demurred. The cause of action had accrued in Prince Edward Island, and it seemed that according to the laws of that Province the debt was barred by the statute, but was not barred by the Statutes of Nova Scotia.

Held, that admitting the debt to be out of date in Prince Edward Island, the plaintiff might nevertheless recover in Nova Scotia, as only the plaintiff's remedy was thereby barred, and the debt was not extinguished.

Carvell et al. v. Wallace..... 165

————, PENAL.

See PROMISSORY NOTE. 1.

STOLEN PROPERTY.

Defendant was convicted of having received certain plates covered with amalgam, stolen from a crushing mill, knowing them to have been stolen. An application was made by the Napier Gold Mining Company for restitution to them of a bar of gold extracted by defendant from the amalgam. It being uncertain whether the company or one Shaffer were the parties properly entitled to the gold, it was ordered that the gold be handed over to the company and Shaffer on their joint receipt, or to the company with the sanction of Shaffer.

The Queen v. Black..... 231

SURETY.

1. An appeal being taken from a magistrate's decision, the defendant and one W., an attorney of the Supreme Court, became sureties on the appeal bond. On the ground of W. being a surety the bond was held irregular and the appeal dismissed by the Supreme Court. Plaintiff then resorted to his original judgment, and the execution being returned unsatisfied, sued defendant on the bond.

Held, that he could not recover, as by the course he had taken he had waived all right or claim against defendant under the appeal bond.

McNeil v. Morehouse..... 314

2. Defendant, one of the sureties on an appeal bond, which became forfeited, resisted payment on the ground that when he signed the bond he did not know who his co-surety was to be.

Held, that in the absence of fraud this was no defence.

Smith v. McNeil..... 317

————, DISCHARGE OF.

See GUARANTEE, 1, 2

TITLE.

See COLORABLE TITLE.

TRESPASS.

1. Defendant built a stone wall between his land and that of plaintiff, of which three feet at the bottom and one foot nine inches at the top were on plaintiff's property. At the time the wall was erected plaintiff said to defendant's builder: "You're building on my land;" he said, further, that he had no objection, but "I caution you that in the case of my selling the purchaser may put you to trouble."

Held, that this was a qualified license justifying the erection of the wall but going no further.

Peters v. Frecker 67

2. W. M. C. becoming insolvent, his estate, under the provisions of the Insolvent Act, was placed in the hands of the official assignee. Subsequently, at the request of his creditors, the assignee allowed him to resume possession of the goods and to sell them for their benefit. No deed of composition was entered into, nor was there any transfer of the goods to W. M. C., nor any discharge given him. After they had been some time in his possession, the defendant, as City Marshal, acting under an execution at the suit of T. J. W., one of the creditors, seized and sold a portion of the goods. The assignee thereupon sued him for trespass.

Held, that the seizure and sale were illegal, the goods being still in the possession of the assignee, and that defendant was liable in damages.

Harvey v. Cotter 161

3. Plaintiff and defendant entered upon land under claims of title derived from the same ancestor, and exercised similar acts of ownership. Some years after his entry plaintiff received a deed of the land from an uncle who, though he claimed the whole, was entitled at most to one-half. After the making of the deed and down to the time of bringing the action, both parties continued to exercise acts of ownership, as before.

Held, (WILKINS, J., dissenting,) that plaintiff had not such an exclusive possession of the lot as entitled him to bring trespass against defendant.

Taylor v. Archibald 233

4. Defendant made a distress upon plaintiff for rent lawfully due, but did not give him the five days' notice of the sale of the goods distrained as prescribed by statute.

Held, That he was a trespasser *ab initio* and liable in damages.

Cornelius v. Burton 337

5. Plaintiff and defendant were tenants in common of a certain dwelling-house, and defendant took off the doors and carried them away, broke down partitions and did other injuries to the property, whereupon plaintiff brought an action for trespass against him. Defendant pleaded that plaintiff was not in possession of the house, but that he was and is in sole possession. The jury negatived this plea.

Held, that the action could be maintained, and that the acts of defendant amounting to an ouster, there should be judgment for the plaintiff.

Moore v. Moore 436

6. The occasional cutting of wood and poles in wilderness land is not such a possession as will enable a party to maintain trespass.

Barnhill v. Peppard 491

See VERDICT SUSTAINED.

TRUSTEE TO SELL, Purchase by.

Plaintiffs having appointed defendants their agents for the sale of a vessel of which they were desirous of disposing, defendants offered the vessel for sale at public auction, at which she was knocked down to Paint, one of the defendants, for the sum of £800, who, a few days afterward, re-sold her at an advance of £300, which he appropriated to his own

personal benefit. Prior to the sale at auction, defendants received two offers for the purchase of the vessel, one of an amount equal to that paid by Paint, and another of £50 more than that amount. The previous offers were not communicated to the plaintiffs, one of whom was present at the auction sale and made no objection thereto. A settlement was had with plaintiffs, but without knowledge on their part, either of the sale made by Paint or of the previous offers. Plaintiffs, three years after the sale to Paint, commenced proceedings to compel payment of the amount realized by him on the re-sale of the vessel, with interest.

Held, (1), That Paint, being a trustee to sell the vessel, could not be permitted to buy without first receiving from every one of his *cestuis que trust* clear and explicit authority to divest himself of the trust and become a purchaser of the trust property.

(2.) That this was a case in which the Court would not recognize a bar short of the statutable period of six years.

(3.) That if the plaintiffs were debarred from bringing their action, it was for the defendants first to plead it and second to establish it affirmatively by facts proved.

Semble, That the suppression by Paint of the fact of the reception of the previous offers was of itself sufficient to decide the case for the plaintiffs.

Fish et al. v. Fraser et al...... 514

VENUE, Change of.

Plaintiff, who resided in Kentville, brought an action against defendant and laid the *venue* at Kentville. The contract was made in Halifax, where defendant had resided, and all his witnesses were, and it was as convenient for the majority of plaintiff's witnesses to attend at Halifax for the trial as at Kentville. On application by defendant,

Held, that the *venue* should be changed to Halifax.

Payzant v. Montgomery..... 465

VERDICT set aside as against law.

1. *Sawyer v. Gray*..... 77

2. *Dodge v. Halifax Gas Light Co.*..... 325

3. The legal rights of the parties were entirely dependant upon an agreement under seal, and the Judge presiding at the trial instructed the jury that under the terms of that agreement, and the facts in proof, there should be a verdict for defendant, nevertheless the jury found for the plaintiff. On rule nisi for a new trial,

Held, that as the construction of the agreement was a matter for the Court, the verdict should be set aside and the rule for a new trial made absolute.

Whitehead v. Howard..... 458

AS AGAINST WEIGHT OF EVIDENCE AND JUDGE'S CHARGE.

Coxetter v. Hornsby et al...... 246

FOR WANT OF EVIDENCE.

McPhee v. Victoria Coal Mining Co...... 64

See NEGLIGENCE.

VERDICT sustained.

1. Rule to set aside verdict for plaintiff dismissed, the defendant having failed on all his grounds.
Faulkner v. Gunn 251
2. The plaintiff sought to have a verdict for defendant set aside, on the ground that the schedule attached to the deed of composition and discharge under the Insolvent Act should not have been received in evidence. No objection could have been raised to the deed itself, the schedule was attached to the deed when produced, and no evidence was adduced to shew that it was not so attached when the deed was executed.
Held, that there was no ground for disturbing the verdict.
Wallace v. Brehm 263
3. Action of ejectment between adjoining proprietors, the questions being entirely matters of fact, and the jury having found for the plaintiff, although there was sufficient evidence to justify a verdict the other way if they had thought fit,
Held, that the verdict should not be disturbed.
The defendant tendered two plans in evidence which came from the Crown Land Office, which the witness who produced them stated had been there for at least thirty years, but neither their origin nor history was given, nor was it shewn that they had been regarded in that office as authentic.
Held, that the Judge had done right in rejecting them.
Walker et al. v. Bayers 270
4. Action of ejectment for an undivided moiety of certain lands, defendant being legally entitled to the other half, but claiming the whole, and having actually ousted plaintiff therefrom.
The jury found for the plaintiff, on certain questions of fact submitted to them, their answers constituting a complete case for him, and entitling him to a verdict, but seven of them not being able to concur in a general verdict, after four hours' deliberation the Court ordered that a verdict be entered that the plaintiff was entitled to the possession of one-half of the said lands.
Held dubitante, that the verdict for plaintiff should be upheld.
Foster v. Foster 310
5. During a recess which occurred in the progress of a trial, after all the evidence had been put in, but the closing addresses of the counsel not yet delivered, one of the jurors was heard to say aloud: "The plaintiff has got to get his pay and he will get it." The verdict being in favor of plaintiff it was sought to be set aside for misconduct on the part of a juror.
Held, that looking at the circumstances under which the remark was made, there was no ground for disturbing the verdict.
Thibideau v. Everett 318
6. Action for trespass involving title to land, the sole question between the parties being as to the division lines that separated their respective lots.
The verdict being for plaintiff, a rule was taken out under the Statute to set it aside, but on argument,
Held, that the verdict ought not be disturbed.
Campbell v. McKinnon 322
7. The Corporation of Halifax, in making certain street improvements, pulled down plaintiff's porch, which projected across the line of side-walk, whereupon plaintiff sued defendant for damages, he being one of the Aldermen under whose direction the improvements were made. Defendant pleaded in denial and justification. At the trial he sought to introduce evidence to show that previous to the porch being pulled down, plaintiff had agreed to remove it when requested by the city authorities,

or to allow them to remove it themselves. Plaintiff objected and the Judge rejected the evidence. Verdict for plaintiff and rule to set it aside.
Held, That there being no plea of leave and licence, the evidence was properly rejected, and the verdict should be upheld.

Haggarty v. Pryor 358

8. Where the question at issue was purely one of fact, involving no legal points whatever, and the Judge left the whole charge open to the jury, who found for the plaintiff.

Held, That the verdict could not be disturbed.

Lyon v. Morton 459

9. In an action of ejectment the jury found for the defendant, and the Judge refusing a new trial, a rule was taken out under the statute. On argument the weight of evidence being clearly with the defendant.

Held, That the verdict could not be disturbed.

McPhee v. Cameron 467

See CONTRACT—LIBEL—NEGLIGENCE OF RAILWAY CO.

PART-OWNER—WILL, Proof of.

———— IN EJECTMENT NOT SET ASIDE FOR UNCERTAINTY.

When a plaintiff has recovered in ejectment some portion of the lands described in his writ, but it does not clearly appear by the verdict to what portion of the premises claimed he is entitled, the verdict will not be set aside for uncertainty, as the Court will not assume that he will attempt to recover possession beyond what he is entitled to. 'The verdict is ample authority for this, and the plaintiff must ascertain the line at his peril.'

Hamilton v. Pickles 87

———— NOT SET-ASIDE FOR SUSPICIOUS CIRCUMSTANCES.

McNab v. Sawyer 38

WASTE by tenant in dower.

The tenant in dower of wilderness land having, with the consent of C. R., one of the reversioners, sold all the hardwood timber growing upon the land to W. H. H., and allowed the same to be removed by the purchaser, contracted a second marriage with C. S. After the death of C. R., plaintiffs, as reversioners, without joining the heirs of C. R., brought an action of waste against the tenant in dower, C. S., her husband, and W. H. H., the purchaser, claiming damages for the injury to the land by the removal of the timber. The Judge who tried the cause having nonsuited the plaintiffs, and a rule having been taken to set the same aside,

Held, (1st,) That all the persons entitled as reversioners should have been joined as co-plaintiffs, but, as non joinder can only be taken advantage of by plea in abatement, and no such plea was pleaded, the nonsuit, if ordered solely on that ground, could not have been sustained.

(2nd) That in such case the plaintiffs would be entitled to recover, not the full value of the injury done to the land, but only for such portions of the damage as was incurred by themselves alone.

(3.) That the tenant in dower was entitled to cut down the trees on the land for fuel, fencing, improvement, and cultivation, and purposes connected with such improvements, but not to sell the wood for other and different purposes, to the permanent injury of the reversioners, and that for such injury she was responsible to the reversioner.

(4th,) (*dubitante*). That an action will lie against a husband jointly with his wife for waste committed by the latter before their intermarriage

(5th) That W. H. H., the purchaser, acting, as he did, under authority of the tenant, was not chargeable for waste by the reversioners.

Titus et al. v. Sulis et al 497

WHARFAGE, How recoverable.

See PLEADING.

WIFE, Liability of husband for support of.

See HUSBAND AND WIFE.

WILL, Construction of.

The testatrix devised to her grand-children "all my money in the bank or funds," and there was a residuary devise to another party.

Held, That the words did not include a sum of money contained in a chest in testatrix's house.

Re Estate Catherine Barry..... 463

——, Proof of.

Plaintiff in ejectment claimed under an alleged last will, a draft of which was put in evidence. Assuming the will to have been properly executed, which did not clearly appear, there was no evidence that it was ever seen or certainly known to be in existence from the time at which it was made, down to the trial. A verdict having been found for defendant, a rule taken to set it aside was discharged with costs.

Hunter v. McDonald 527

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